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A MODEST PROPOSAL: PERMIT INTERLOCUTORY APPEALS OF SUMMARY JUDGMENT DENIALS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

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42D JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1994

A MODEST PROPOSAL: PERMIT INTERLOCUTORY APPEALS OF SUMMARY JUDGMENT DENIALS

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ABSTRACT: In 1986, the Supreme Court issued three opinions clarifying the standards for summary judgment and encouraged federal district courts to make summary judgment more readily available to litigants. Despite summary judgment's elevated status, courts erroneously fail to summarily dispose of cases when judgment is clearly mandated. Further, the law fails to provide an adequate mechanism to appeal improper summary judgment denials. This thesis reviews the law interpreting Rule 56 of the Federal Rules of Civil Procedure, discusses the shortcomings of potential avenues of appeal, and suggests two methods by which the Supreme Court can provide for interlocutory appeals of improperly denied motions for summary judgment.

Table of Contents

A MODEST PROPOSAL: PERMIT INTERLOCUTORY APPEALS OF SUMMARY JUDGMENT DENIALS

Major Michael Davidson

I. Introduction

Summary judgment motions under Federal Rule of Civil Procedure (FRCP) 56 implement the fundamental policy of the Federal Rules "'to secure the just, speedy and inexpensive determination of every action.'"[1] The precepts governing summary judgment motions are applicable to virtually any cause of action, including employment discrimination,[2] secured transactions,[3] taxation,[4] patents,[5] First Amendment rights,[6] denaturalization,[7] admiralty[8] and civil forfeiture actions.[9]

Federal Rule of Civil Procedure 56 serves the laudable purposes of isolating and disposing of factually unsupported claims and defenses,[10] preventing vexation and delay, expediting disposition of cases, and avoiding unnecessary trials when no genuine issue of material fact exists.[11] It is a practical tool of governance designed to "head off a trial, with all the private and public expenses that a trial entails, if the opponent . . . of summary judgment does not have a reasonable prospect of prevailing before a reasonable jury . . . ."[12]

Summary judgment is not limited to an entire claim or defense, but may be sought and granted as to any portion thereof.[13] The device simplifies the trial and allows the

litigants to better prepare for it by eliminating certain claims and defenses from the trial process.[14]

The Supreme Court has opined that courts should not view motions for summary judgment as disfavored procedural shortcuts, but rather courts should treat such motions as an integral part of the Federal Rules as a whole.[15] Moreover, whenever a moving party satisfies its burden under FRCP 56, the "plain language of [the rule] mandates the entry of summary judgment;"[16] the moving party is entitled to judgment "as a matter of law."[17] Indeed, trial judges have an affirmative obligation to prevent factually unsupported claims and defenses from going to trial,[18] and possess the power to enter summary judgment sua sponte, so long as the losing party was on notice that it had to present its evidence.[19]

Despite FRCP 56's laudable purposes and the Court's strong pronouncements of entitlement, occasionally judges deny motions for summary judgment when such disposition is clearly warranted.[20] A misunderstanding of the current state of the law, issue and factual complexity, time constraints caused by an over burdened trial docket, personal bias or individual notions of justice may serve as the genesis for improperly denied motions.[21]

Unfortunately, the law fails to provide an adequate mechanism to challenge improperly denied summary judgment

motions. Generally,[22] the denial of a FRCP 56 motion is an interlocutory order that is not appealable.[23] The primary policy reason supporting this general rule is to avoid piecemeal appeals.[24]

Theoretically, upon an entry of final judgment, interlocutory orders merge into the court's final order and become subject to appellate review.[25] However, most jurisdictions will not permit a party to appeal a summary judgment denial after a full trial on the merits.[26] Because the moving party may not seek an immediate appeal of the improper denial, it must then face the painful choice of bearing the risk and expense of trial[27] or succumbing to judicial[28] and self-imposed pressures to settle.[29]

This article traces the history of summary judgment procedure, culminating with a discussion of the current state of summary judgment law in the federal system. In 1986, the Supreme Court liberalized summary judgment procedure to encourage its use as a means to dispose of factually unsupported cases. Additionally, the article will examine particular issues that often result in the erroneous denial of summary judgment. The article then examines the inadequacy of mandamus, the collateral order doctrine, and certification under 28 U.S.C. § 1292(b) as mechanisms to obtain immediate appellate review of summary judgment denials. Finally, the article proposes means by which

improper denials could gain immediate appellate review.

The scope of this article is limited to occasions when a court improperly denies a properly supported motion for summary judgment on the merits. The article does not concern itself with partial summary judgments, but rather focuses on summary judgment that, if granted, would resolve all aspects of the case.

It is important to distinguish FRCP 56 from a motion to dismiss under FRCP 12(b) and a judgment on the pleadings under FRCP 12(c). A motion to dismiss usually raises a matter of abatement and a dismissal is without prejudice; the party may reassert the claim once the defect is corrected.[30] Accordingly, a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a necessary party only envisions a dismissal of proceeding; it is not a judgment on the merits.[31] Further, although a motion to dismiss for failure to state a claim upon which relief may be granted addresses the claim itself, the motion merely asserts that the challenged pleading does not sufficiently state a claim of relief; the motion does not challenge the underlying merits of the claim.[32]

A motion for judgment on the pleadings contends that the moving party is entitled to judgment based upon the pleadings alone and only entails an examination of the sufficiency of the

pleadings.[33] Conversely, a motion for summary judgment goes beyond the pleadings and may be based on any evidence properly before the court at the time the motion is decided.[34] The summary judgment movant asserts that, based upon the existing record, there is no genuine issue of material fact and it is entitled to judgment on the merits as a matter of law.[35]

Under modern practice, the courts have blurred the traditional lines between challenges to the pleadings and summary judgment motions.[36] When the moving party introduces matters outside the pleadings, a court will convert motions to dismiss for failure to state a claim and motions for judgment on the pleadings into motions for summary judgment.[37] The court retains the discretion to decide whether to accept the accompanying evidence that triggers the conversion; however, once the court accepts those documents, it must convert the motion.[38] Because they address the merits of the underlying claim, converted motions fall within the scope of this article.

A court may not convert any other FRCP12 motion into a motion for summary judgment.[39] Federal Rule of Civil Procedure 12(f) does not authorize a district court judge to treat a motion to strike an insufficient defense as a motion for summary judgment.[40] Because the question of subject matter jurisdiction is inappropriate for summary judgment, a court may not convert a FRCP 12(b)(1) motion to dismiss for lack of subject matter

jurisdiction into a motion for summary judgment.[41] A court that dismisses a case for lack of jurisdiction never reaches the merits of the action.[42]

II. Summary Judgment

A. Historical Background

The genealogy of a "summary" proceeding in civil procedure can be traced loosely to both Roman law and medieval Canon law decreed in 1306 during the reign of Pope Clement V.[43] Pope Clement sought to create a mechanism to have legal disputes decided "'simply, on the level, without confusion or legal formalism.'"[44] Later, medieval English merchants, engaging in much of their commerce at borough fairs, developed fair or piepowder courts that included a form of summary procedure to settle disputes.[45] However, as a result of increased wealth and improved transportation, fairs diminished in commercial importance with a concomitant decline in the use of piepowder courts.[46] Gradually, merchants abandoned these courts and brought their mercantile disputes to the common law and chancery courts.[47]

As their dockets increased and as they adopted increasingly complex rules of procedure, the common law and chancery courts experienced lengthy delays. Unscrupulous lawyers advised their

debtor-clients to exploit the highly technical rules governing pleading, causing numerous case dismissals because of defects in form.[48] Further, debtors plead fictitious defenses to discourage creditors from pursuing suits by the prospect of increased expense and to delay the proceedings. Significantly, because the courts had no method by which they could examine the factual basis of a suit or defense prior to a trial on the merits, they failed to correct these tactics and the system flourished.[49]

In response to mercantile pressure, Parliament enacted Keating's Act,[50] providing a summary judgment procedure to expedite the legal enforcement of debts based on bills of exchange.[51] Gradually, use of the procedure expanded in England to include virtually all actions at law.[52]

During the nineteenth century, with limited exceptions, civil procedure systems in the United States were based on English practice.[53] Forms of action were highly rigid and technical, generating much litigation over minute formalistic deviations from pleading requirements.[54] American courts encountered the identical sham pleadings found in England.[55] Common law and code pleading rules mandated that a court decide a party's demurrer or similar motion based solely upon the face of the pleadings.[56] Accordingly, a party could not go beyond the pleadings to establish that it had no basis in fact.[57] Because courts assumed that all pleadings were in good faith, based upon

evidence to be presented at trial, any challenge to the truth of a pleading that stated a claim or a defense necessitated a trial.[58]

States responded to the sham pleadings by either permitting motions to strike as sham or by requiring verification of the pleadings. The former failed because of the high standard of proof required and because many states did not apply such motions to general denials.[59] Verification proved ineffective because the requirement denigrated into a mere formality.[60]

In contrast to English civil procedure, which had become simplified by the late 1800s, turn-of-the-century American civil procedure was in complete disarray.[61] Most state and federal courts followed different rules for actions in equity and in law.[62] Following the Conformity Act of 1872,[63] federal courts applied contemporary state procedural rules in all actions at law, which were often compartmentalized and technical.[64] Accordingly, a federal court could only grant summary judgment for an action at law if the corresponding state had made provision for such a procedure.[65] Summary judgment was unavailable in federal court for actions in equity because federal equity rules failed to provide for such a procedure.[66]

The revised English summary judgment procedure did not become firmly established in the United States until the

twentieth century. In 1912, New Jersey became the first state to adopt a summary judgment procedure.[67] Gradually, states adopted summary judgment devices as part of their civil codes; however, these codes limited summary judgment to certain classes of action[68] and usually did not permit defendants to avail themselves of the procedure.[69] Prior to the adoption of FRCP 56 in 1938, a summary judgment procedure that applied to either party and that was not dependant upon the nature of the action did not exist in the United States.[70]

B. Federal Rule of Civil Procedure 56

Promulgated pursuant to the Rules Enabling Act of 1934,[71] the Federal Rules of Civil Procedure became effective on September 16, 1938.[72] The rules provided for a nation-wide uniform standard, broader judicial discretion, and the unification of equity and common-law procedure.[73] The proponents of the Rules Enabling Act viewed the procedural uniformity as a tool to streamline litigation and arrive promptly at an adjudication of the merits.[74]

Federal Rule of Civil Procedure 56 established the standards applicable to summary disposition of cases in federal court. The Rule was intended to play a substantial role in the expeditious resolution of cases.[75] The drafters envisioned FRCP 56 serving as the primary mechanism for disposing of facially valid claims

and defenses that, when probed, proved to be groundless.[76] Further, the drafters intended that summary judgment be applicable to all civil actions.[77]

III. The Supreme Court Trilogy And Existing Summary Judgment Law

A. The Supreme Court Trilogy

Prior to 1986 much of the federal judiciary was reluctant to grant motions for summary judgment.[78] The Supreme Court warned against "trial by affidavits" and did not hesitant to reverse grants of the motion.[79] As late as 1979, the Supreme Court cautioned lower courts against granting summary judgment in cases involving state-of-mind issues.[80] The Second Circuit required the trial judge to deny a summary judgment motion if there was the "slightest doubt" as to the motion's propriety.[81] The Fifth Circuit developed a reputation for reversing summary judgment grants causing one federal district court judge in New Orleans to post the sign, "'No Spitting, No Summary Judgments.'"[82]

Heralded as bringing about a "new era" for summary judgments,[83] three 1986 Supreme Court decisions effected a decided change in summary judgment practice.[84] The three decisions -- Matsushita Electric Industrial Co. v. Zenith Radio Corp.,[85] Celotex Corp. v. Catrett,[86] and Anderson v. Liberty Lobby, Inc.,[87] departed from prior summary judgment precedent and

signalled a turn toward greater approval of summary judgment dispositions.[88] As an illustration of this change in judicial attitude, the Second Circuit immediately reversed its prior stance toward summary judgment, noting:

> It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time . . . .[89]

1. Matsushita -- The Movant's Burden.--In Matsushita Electric Industrial Co. v. Zenith Radio Corp.,[90] several American corporations that manufactured and sold consumer electronic products (CEP), primarily television sets, brought suit against a number of Japanese companies. Plaintiffs alleged the Japanese manufacturers had illegally conspired to drive American companies from the CEP market by maintaining artificially low prices for Japanese goods sold in the United States while simultaneously causing prices for American goods sold in Japan to be fixed at an artificially high price.[91] Plaintiffs argued that the defendants were able to sustain below-cost sales of Japanese products in the United States consumer markets through profits obtained in the controlled Japanese markets.[92] The defendants acted with the

full cooperation and support of the Japanese government.[93]

After years of discovery and pretrial proceedings, the district court held that much of plaintiffs' evidence offered in opposition to defendants' motion for summary judgment was inadmissible and granted summary judgment, opining that the admissible evidence did not raise a genuine issue of material fact as to the existence of the conspiracy.[94] The Court of Appeals for the Third Circuit reversed, determining that much of the excluded evidence was in fact admissible; and holding that in light of all the evidence a reasonable factfinder could find that a Japanese conspiracy to drive out American competitors existed.[95]

The Supreme Court granted certiorari[96] to determine whether the American manufacturers - the nonmovants - had adduced sufficient evidence in support of their predatory pricing conspiracy theory to survive summary judgment.[97] The Court held that to survive a properly supported motion for summary judgment, the nonmovant "must come forward 'with specific facts showing that there is a genuine issue for trial.'"[98] To meet this burden, the nonmovant must do more than raise a "metaphysical doubt as to the material facts;"[99] the nonmovant must establish that the record taken as a whole could support a finding by "a rational trier of fact" in favor of the nonmoving party.[100] The Court concluded that the American manufacturers failed to meet

their burden and reversed the Third Circuit's decision.[101]

Significantly, the Court permitted district courts to weigh the persuasiveness of the nonmovant's evidence presented in opposition to a motion for summary judgment.[102] If the factual context renders the nonmovant's claim or defense implausible, that party "must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[103] The Court confirmed the judicial authority to review the quality of evidence presented at a motion for summary judgment, remanding the case to the Third Circuit with the order to determine if any other unambiguous evidence existed to permit a trier of fact to find a predatory price conspiracy.[104]

Additionally, the Court diluted the preferential inference that the nonmovant was entitled to draw from the underlying facts. Although acknowledging that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party,[105] the Court limited this principle, opining that the substantive law of the case may limit the permissible inferences to be drawn from ambiguous evidence.[106] Further, facts that are equally consistent with both parties' theory of the case do not, standing alone, support an inference favoring the nonmovant's position.[107]

2. Celotex -- Burdens of Proof.--Three months after

deciding Matsushita, the Supreme Court used Celotex Corp. v. Catrett to elaborate on the parties' respective burdens of proof in a motion for summary judgment. In Celotex, Ms. Catrett filed a wrongful death suit against several asbestos manufacturers, alleging that her husband's death was caused by exposure to asbestos manufactured or distributed by the defendants.[108] After a period of discovery, the Celotex Corporation moved for summary judgment, asserting that Catrett was unable to produce evidence supporting her claim that the decedent had been exposed to Celotex's asbestos products.[109] The district court granted the motion; however, the circuit court reversed, holding that Celotex's failure to produce evidence negating Catrett's claims precluded summary judgment.[110]

The Supreme Court granted certiorari[111] and reversed, holding that summary judgment was proper.[112] Writing for the majority, Justice Rehnquist explained that the moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact.[113] However, FRCP 56 does not require that the moving party support its motion with evidence negating the nonmoving party's claim.[114] Regardless of the moving party's failure to support a motion with affidavits or other evidence, the court should grant summary judgment "so long as whatever is before the district court" satisfies the requirements of FRCP 56.[115]

When the burden of proof at trial is on the nonmoving party, the moving party's initial burden is not onerous. The moving party may discharge its initial burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case."[116] In other words, the moving party could challenge the opposing party to "'put up or shut up' on a critical issue."[117]

Once the moving party has satisfied its burden, the nonmoving party cannot rest on its pleadings, but must produce affidavits, depositions, answers to interrogatories, admissions, or other evidence to "designate 'specific facts showing that there is a genuine issue for trial.'"[118] If the nonmovant did not "put up" by designating such facts, then summary judgment is proper.[119] Evidence produced in opposition to the motion need not be in a form admissible at trial, but it should be of those types listed in FRCP 56(c).[120]

Although Catrett was a 5-4 decision, all nine justices generally agreed with the majority opinion's articulation of the respective burdens borne by the parties for summary judgment.[121] Justice White's concurring opinion distanced itself from the majority only to the extent that it seemed to indicate that the moving party could satisfy its burden "without supporting the motion in any way or with a conclusionary assertion that the

plaintiff has no evidence to prove his case."[122] Three of the dissenters did not criticize the majority's statement of summary judgment law; they merely criticized its application to the particular facts of the case.[123] The remaining dissenter, Justice Stevens, believed that the Court should have affirmed the circuit court's decision on the "narrow ground" of a district court venue error.[124]

3. Anderson -- Evidentiary Standards.--In Anderson v. Liberty Lobby, Inc.,[125] the Court took the opportunity to explain the evidentiary standard that the district court must apply when considering a summary judgment motion. Significantly, the Court held that the trial judge must consider any heightened standard of proof borne by the plaintiff, such as clear and convincing evidence.[126]

Liberty Lobby, a nonprofit organization and "self-described 'citizen's lobby,'' brought a libel action against columnist Jack Anderson and certain other co-workers in response to several articles in which the defendants characterized members of Liberty Lobby as neo-Nazi, anti-Semetic, racist and Facist.[127] Under existing law, plaintiffs, as public figures, could not recover unless they could prove by clear and convincing evidence that the defendants acted with actual malice.[128]

Under prevailing precedents, the district court should have

denied a motion for summary judgment; the record was voluminous, the issues were complex and there were several issues involving the defendants' state of mind.[129] Nevertheless, the district court granted the defendants' motion for summary judgment, holding that the plaintiffs were unable to establish actual malice.[130]

On appeal, the circuit court reversed, holding that for purposes of summary judgment the plaintiffs were only required to prove their case by a preponderance, rather than by clear and convincing evidence.[131] The circuit court believed that "to impose the greater evidentiary burden at summary judgment 'would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.' "[132] Concluding, the circuit court held that the district court had improperly granted summary judgment because "'a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice.' "[133]

The specific issue before the Supreme Court was whether the circuit court had erred by failing to consider the plaintiffs' heightened evidentiary burden for proof of actual malice, at the summary judgment stage.[134] The Court began its analysis with the language of FRCP 56, which requires there be "no genuine issue of

material fact."[135] The Court believed this standard provided "that the mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment;" the dispute must be "genuine" and the disputed facts "material."[136]

The Court stated that the substantive law of the case will determine which facts are material.[137] Only those disputed facts that may affect the outcome of the case under the governing law will preclude the entry of summary judgment; "irrelevant or unnecessary [factual disputes] will not be counted."[138]

The dispute over these material facts must be genuine, i.e., the evidence must be such that a reasonable trier of fact could return a verdict for the nonmoving party.[139] Accordingly, the nonmoving party may not rest upon the allegations or denials of its pleadings, but must present "significantly probative" evidence to support its complaint.[140] If the evidence presented is "merely colorable" or is not significantly probative, the court may grant summary judgment.[141] The existence of a mere "scintilla of evidence" will not satisfy the nonmovant's burden.[142]

The Court acknowledged that its interpretation of the summary judgment standard mirrored the standard for a directed verdict under FRCP 50(a).[143] If, under the applicable law,

reasonable minds would not differ as to the import of the evidence and the resultant verdict, the trial judge must direct a verdict.[144] Accordingly, summary judgment may be viewed as an early motion for a directed verdict.[145]

Significantly, the Court also held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."[146] When determining whether a genuine issue of material fact exists, the trial judge must consider "the actual quantum and quality of proof necessary to support liability" under the substantive law.[147] When, as in Liberty Lobby, the nonmoving party must meet a higher evidentiary burden at trial, such as proving an issue by clear and convincing evidence, that party must meet the same burden in resisting summary judgment.[148] Consequently, the appropriate summary judgment inquiry in Liberty Lobby was whether the evidence could support a reasonable jury finding that the plaintiff had established actual malice by clear and convincing evidence.[149] Because the circuit court had not reviewed the district court's grant of summary judgment through the prism of clear and convincing evidence, the Court vacated the circuit court's decision and remanded for reconsideration.[150]

Notably, the Court neither limited this qualitative review to defamation cases nor limited its holding, that the applicable evidentiary burden be incorporated into the summary judgment

determination, to higher standards.[151] Further, in the wake of Matsushita, the Court's opinion in Anderson arguably adds the proposition that, when judging the relative plausibility of competing inferences, "the critical point of relative plausibility varies as a function of the standard of proof."[152] Accordingly, in deciding a motion for summary judgment, the trial judge must consider both who has the burden of proof at trial and the nature of that burden. The nonmovant may no longer rely on its traditional entitlement to reasonable inferences from facts within the record to survive a motion for summary judgment.

4. Summary: Supreme Court Clarification And Liberalization of Rule 56.--Focusing on questions of constitutional import, the Supreme Court rarely writes extensively about a federal rule of civil procedure.[153] The mere fact that the Supreme Court elected to hear, decide, and write thorough and far-reaching opinions on three cases in one term about a single rule of civil procedure signalled a significant change in judicial attitude toward the summary judgment device.[154] Significantly, in all three cases, the Supreme Court overturned circuit court reversals of summary judgment awards by district courts.

As one legal commentator noted, "the majority opinions read like an ode to the wonders of summary judgment."[155] The Court's message has been to disregard previous dictum solicitous of nonmovants; trial courts should start aggressively granting

summary judgment motions when appropriate.[156]

As Justice Rehnquist wrote in Celotex, summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "'to secure the just, speedy and inexpensive determination of every action.'"[157] Courts must construe FRCP 56 "with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial, that the claims and defenses have no factual basis."[158] Indeed, the last two sentences of FRCP 56(e) were "designed to facilitate the granting of motions for summary judgment . . . ."[159]

Clearly, the language contained in the Supreme Court trilogy of cases changed the tone of the Court's perspective on summary judgment motions, signaling lower courts that they should not be unduly cautious in granting such motions.[160] The Court's rhetoric in these three decisions created an environment conducive to greater use and granting of the motion.[161] The Supreme Court sought to encourage courts to interpret FRCP 56 in such a manner that allows the trial court to isolate and dispose of factually unsupported claims and defenses without fear of over zealous second-guessing at the appellate court level.[162]

After the Supreme Court's trilogy of cases, summary judgment law generally favors the defendant, particularly if the defendant is the movant and does not bear the heavier burden at trial.[163] The trilogy permits the moving party to challenge the opposing party's evidence prior to trial. In other words, the moving party may challenge the nonmoving party to "put up or shut up."[164] If the nonmoving party fails to establish a genuine issue of fact for trial, it forfeits its right to a trial on the merits.

IV. Summary Judgment: The Current State Of The Law

A. The Movant's Burden

For purposes of summary judgment, the law governing burdens of proof at trial determine the relative burdens of the parties to obtain or survive summary judgment.[165] The moving party always bears the initial burden of establishing that there are no genuine issues of material fact necessitating a trial on the merits.[166]

If the moving party bears the burden of proof at trial, it must submit evidentiary material affirmatively establishing all the essential elements of its case such that no reasonable jury could find for the opposing party.[167] Further, it may need to negate the existence of some material element of the nonmoving

party's claim or defense.[168] However, if the nonmoving party bears the burden of proof at trial, the movant may satisfy its summary judgment burden merely by pointing out that the nonmovant cannot establish an essential element of its case.[169]

Although the Supreme Court stated that, when it does not bear the burden of proof at trial, a moving party's may satisfy its burden by "'showing' -- that is pointing out to the district court -- that there is an absence of evidence supporting the nonmoving party's case,"[170] the moving party's may not satisfy its burden merely by filing an unsupported motion or by filing a declaration that the nonmoving party lacks sufficient evidence to prove his case.[171] As a minimum, the movant must inform the district court of the basis of its motion and identify those portions of the record that establish the absence of a genuine issue of material fact.[172]

In his concurring opinion in Celotex, Justice White clarified the Court's opinion, writing: "[I]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[173] The moving party must still discharge the burden FRCP 56 places upon it.[174]

B. Surviving The Motion: The Nonmovant's Burden

If the moving party carries its initial burden of presenting the court with a properly supported motion for summary judgment, then the nonmoving party "'must set forth specific facts showing that there is a genuine issue for trial.'"[175] However, this burden shifts to the nonmovant "[i]f -- and only if -- the moving party carries the initial burden . . . ."[176] The quantum of evidence required to survive summary judgment will depend on the nonmovant's burden at trial.[177]

When the nonmoving party bears the burden of proof at trial, summary judgment is appropriate if the nonmovant cannot '"make a showing sufficient to establish the existence of an element essential to [its] case.'"[178] The nonmovant must make a sufficient showing on every essential element of his case for which it bears the burden of proof at trial.[179] When there exists a complete failure of proof concerning an essential element of the nonmovant's case, all other facts are rendered immaterial.[180] This burden is not satisfied when the nonmovant assures the court that it will develop further facts later or at trial.[181] Further, the "mere existence of a scintilla of evidence" in support of the nonmoving part's position is insufficient to prevent summary judgment.[182]

If the nonmoving party does not bear the burden of proof at trial, it must respond to the moving party's affirmative evidence, which presumably has established its entitlement to

summary judgment on every essential element of its case. The nonmoving party will not survive summary judgment unless "in response, [it] 'come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'"[183] This evidence does not necessarily have to be new and different evidence from that presented by the movant; it may be material already on file with the court.[184] If the nonmovant points to evidence in the record that the movant had used to support its motion for summary judgment, the nonmovant has satisfied its obligation to "go beyond the pleadings . . . [to] designate specific facts showing that there is a genuine issue for trial."[185]

The evidentiary burden on a nonmoving party in a motion for summary judgment is greater than in a motion to dismiss.[186] The law requires more from the nonmovant to survive a motion for summary judgment than presenting a complaint that states a claim upon which relief may be granted.[187]

The nonmoving party may not escape summary judgment by relying solely on the court drawing all inferences in its favor. While acknowledging the traditional inferences afforded to the nonmoving party, many courts are limiting those inferences. The inferences must be "reasonable" ones.[188] The nonmovant may receive the benefit of inferences only if they are "justifiable inferences from the evidence."[189].

As the Court in Matsushita and Liberty Lobby indicated, a district court may examine the nonmovant's evidence for both its evidentiary sufficiency and its qualitative import, e.g., its "implausibility."[190] Where the factual context of the case makes the nonmovant's claim or defense implausible, that party must come forward with more persuasive evidence to survive summary judgment than ordinarily would be required.[191]

In addition to drawing all reasonable inferences in the nonmoving party's favor, the court must view the evidence in the light most favorable to that party.[192] Because credibility determinations are not appropriate at the summary judgment stage, the court must accept the nonmovant's evidence as true for purposes of the motion.[193]

There are limits to the nonmovant's ability to raise a genuine issue of material fact through the submission of contradictory evidence. Evidence that is merely colorable or not significantly probative will not forestall summary judgment.[194] A district court must resolve factual issues of controversy in the nonmovant's favor only "where the facts specifically averred by that party contradict facts specifically averred by the movant . . . ."[195] Further, a nonmoving party does not generally create a genuine issue of material fact by submitting an affidavit that contradicts previous deposition testimony[196] or that merely

contains conclusory allegations.[197]

Similarly, legal memorandums will not create an issue of fact capable of defeating an otherwise proper motion for summary judgment.[198] Nor may the nonmovant survive summary judgment simply by attacking the credibility of the movant's affiants without a supporting factual basis.[199]

Even with the benefit of all reasonable inferences and the evidence viewed in the light most favorable to it, the nonmoving party must do more than present minimal evidence on the issue it asserts is disputed.[200] Indeed, after Liberty Lobby, the nonmovant may not merely produce "specific facts" that establish that there is some foundation for its claim; the nonmovant must produce enough facts to allow a reasonable jury to return a verdict in its favor.[201]

Although the nonmovant's failure to oppose summary judgment waives the right to contradict any facts asserted by the movant,[202] the failure to respond to a motion for summary judgment does not automatically entitle the moving party to judgment.[203] Because FRCP 56 provides for summary judgment only "if appropriate," the court must determine entitlement to summary judgment based upon the parties' submissions.[204] Accordingly, where the evidentiary record does not establish the absence of a genuine issue of material fact, the court must deny summary

judgment even if the nonmoving party has failed to submit opposing evidence.[205]

C. Special Issues

1. Intent And Motivation.--Traditionally, courts and commentators have exhibited a reluctance to grant summary judgment in cases involving issues of intent or motivation.[206] Indeed, in Poller v. Columbia Broadcasting System, Inc.,[207] the Supreme Court provided support for this reluctance when the Court cautioned that summary judgment should be "used sparingly in complex anti-trust litigation where motive and intent play leading roles."[208] Accordingly, courts have denied summary judgment in cases involving fraud, labor disputes, denaturalization, mistake, and corporate judgment.[209] The unwillingness to grant summary judgment in cases involving state of mind issues was particularly pronounced in the employment discrimination arena,[210] a hesitancy that continues to exist in some courts.[211]

Fortunately, not all courts have exhibited this attitude. Many courts are more receptive to granting a properly supported motion for summary judgment in cases involving issues of intent,[212] even in employment discrimination cases.[213] Courts have granted summary judgment to defendants in cases involving fraud, conspiracy, and other claims involving state of mind issues when

the opposing party was unable to support its allegations sufficiently to create a genuine issue of material fact.[214]

Continued judicial reluctance to grant summary judgment in cases involving issues of motive or intent is misplaced.[215] Federal Rule of Civil Procedure 56 fails to distinguish state of mind from other issues, an omission that is apparently knowing and deliberate.[216] Further, Liberty Lobby was a significant departure from the Supreme Court's historical reluctance to grant summary judgment in such cases.[217] One of the most revealing aspects of the Court's opinion was its recognition that a mere contention that state of mind issues are implicated is insufficient to defeat a properly supported motion for summary judgment.[218]

In any case where intent or motivation is at issue, the basic allocation of burdens of proof remains the same.[219] As long as the moving party properly supports its motion, and the nonmoving party fails to present evidence setting forth specific facts that create a genuine issue of material fact regarding that motive or intent, summary judgment is proper.[220]

The typical disparate treatment Title VII[221] employment discrimination case serves as an excellent forum to illustrate this point. The Supreme Court articulated the parties' respective burdens of proof in McDonnell Douglas Corp. v.

Green.[222] The Court determined that when there is an absence of direct evidence of discrimination, and the plaintiff is relying on circumstantial evidence, the plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence.[223] The elements of a prima facie case are flexible, varying with the specific adverse employment action.[224] The establishment of a prima facie case creates a presumption that the employer acted unlawfully and shifts the burden of production to the defendant.[225] An inference of discrimination is raised only because the court "'presume[s] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'"[226]

To rebut the presumption of discrimination, the defendant must set forth legitimate reasons for the challenged action.[227] Specifically, the defendant "must articulate some legitimate, nondiscriminatory reason" for its conduct.[228] The Supreme Court explained that this burden is not simply one of pleading; rather, the defendant must advance admissible evidence establishing a nondiscriminatory reason for the challenged employment action.[229] The defendant's burden is an easy one to satisfy. It is not required to persuade the court that its articulated reason for the employment decision is the true reason.[230] The defendant must only raise "a genuine issue of fact as to whether it discriminated against the plaintiff."[231]

Should the employer satisfy its burden, the plaintiff must prove by a preponderance of the evidence that the defendant's reasons are a pretext for discrimination[232] and that discrimination was the real reason for the challenged action.[233] The ultimate burden of persuading the trier of fact that the defendant unlawfully discriminated remains at all times with the plaintiff.[234]

When deciding a motion for summary judgment, the trial judge must view the evidence through "the prism of the substantive evidentiary burden."[235] In a Title VII case, the plaintiff bears the ultimate burden of proof at trial. Accordingly, the substantive evidentiary burdens found in a Title VII case on the merits affects significantly summary judgment analysis.[236]

When the defendant is the moving party, its burden is satisfied by pointing out that the plaintiff cannot establish a prima facie case of discrimination.[237] To survive summary judgment, the plaintiff must be able to establish a prima facie case of discrimination.[238] If the defendant cannot articulate a legitimate, nondiscriminatory reason for its action, then summary judgment for plaintiff is appropriate.[239] However, if the defendant can articulate such a reason, the plaintiff must raise a genuine issue of material fact as to whether the articulated reason is pretextual to survive summary judgment.[240] If the plaintiff raises a genuine issue as to the legitimacy of the

defendant's stated motive, summary judgment is inappropriate because it is for the trier of fact to determine which story is to be believed.[241] Conversely, if the plaintiff fails to provide adequate evidence of pretext in the face of the defendant's strong justification evidence, summary judgment is appropriate.[242]

In comparison, if the plaintiff is the moving party, the evidentiary requirements for summary judgment are analogous to the evidentiary requirements for a directed verdict.[243] The plaintiff must establish each element of its claim to such a degree of certainty that no reasonable trier of fact could find against it.[244] For summary judgment, the plaintiff must establish a prima facie case of discrimination and, if the defendant has articulated a legitimate reason for the challenged action or such a reason has been established through discovery, establish that the proffered reason is a pretext for discrimination.[245] If the plaintiff fails to make such a showing, of if the nonmovant-defendant presents sufficient evidence to raise a genuine issue of material fact, the plaintiff is not entitled to summary judgment.[246]

2. Complexity.--Courts should not deny a properly supported motion for summary judgment merely because of the case's complexity.[247] Indeed, summary judgment's utility as a mechanism for the efficient resolution of disputes would be undermined seriously if unsubstantiated assertions were sufficient to compel

a trial merely because they were factually or legally complex.[248]

The original advisory committee note accompanying FRCP 56 stated that the Rule applied to all actions.[249] Neither FRCP 56 nor the Advisory Committee Note provides for the special handling of summary judgment motions in complex cases.[250] All civil actions subject to a motion for summary judgment -- complex or simple -- should be subject to the same standard.[251]

A series of Supreme Court cases during the 1940's served as the basis for a body of precedent that accords special treatment to factually complex cases.[252] As an illustration, in Arenas v. United States,[253] the Supreme Court reversed the grant of summary judgment after a full-blooded Mission Indian sued to be awarded a trust patent to certain land on the Palm Springs Reservation.[254]. In reversing the summary disposition, the Court opined that a district court's duty under this legislation could "be discharged in a case of this complexity only by trial, findings and judgment in regular course."[255]

Current summary judgment case law has rejected the notion that a court should not grant summary judgment merely because the case is factually complex. The factual record in Matsushita was complex and, in the words of the Supreme Court, could "fill an entire volume of the Federal Supplement."[256] Nevertheless, the

Court indicated that summary judgment was proper even in such complex antitrust cases.[257] As long as the record before the court establishes the absence of a genuine issue of material fact, the mere complexity of the case is an insufficient reason to deny summary judgment.

3. Evidentiary Standards.--Federal Rule of Civil Procedure 56(e) permits the nonmoving party to resist a motion for summary judgment with "affidavits or as otherwise provided in this rule . . . ."[258] The facts upon which the nonmovant relies must be admissible at trial,[259] but they do not need to be in admissible form.[260] In Celotex, the Court held that in opposing a motion for summary judgment, the nonmoving party need not "produce evidence in a form that would be admissible at trial . . . ."[261] As an illustration, the Court noted that FRCP 56 does not require the nonmoving party to depose its own witnesses.[262] The Court opined that FRCP 56 permitted a party opposing summary judgment to offer "any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . ."[263] Federal Rule of Civil Procedure 56(c) lists the following permissible evidence: affidavits, depositions, answers to interrogatories, and admissions on file.[264]

In the wake of Celotex, two schools of thought have emerged regarding the admissibility of evidence offered in opposition to a motion for summary judgment. A few courts have interpreted the

Court's opinion to mean that inadmissible evidence may be considered without regard to whether the facts can be established at trial.[265] Most courts hold that the Court's opinion in Celotex merely clarified the nonmovant's right to oppose summary judgment with any of the material listed in FRCP 56(c); including affidavits, which normally would constitute hearsay, or testimony contained within affidavits in a form not admissible at trial.[266]

The latter view seems to be the proper one. Summary judgment is designed to eliminate unnecessary litigation by testing the proof of the litigants.[267] In effect, summary judgment is a preview of the evidence that the litigants intend to introduce at trial.[268] As an adjunct to the test of proof, FRCP 56(e) specifically limits the use of affidavits to those made on personal knowledge, setting forth facts admissible at trial, and made by persons competent to testify as to the matters contained within the affidavit.[269]

In support of, or in opposition to, summary judgment the parties will want to ensure that any oral testimony that they intend to produce at trial is presented to the trial judge. Indeed, FRCP 43(e) authorizes the use of oral testimony, or in its stead affidavits or depositions, as evidence on motions before the court.[270] As a time saving mechanism, the courts require the oral testimony to be presented in affidavit form.[271] Although an affidavit would normally be inadmissable at trial as

hearsay, it is admissible at the summary judgment stage. Accordingly, an affidavit satisfying the requirements of FRCP 56, including testimony contained within the affidavit that could be cast into a form admissible at trial, may properly be considered.[272]

The vast majority of jurisdictions hold that a court may not consider an affidavit unless it is based on personal knowledge when resolving a summary judgment motion.[273] Supporting affidavits may not be based upon rumor or conjecture[274] or "'upon information and belief.'"[275] Courts may disregard those portions of an affidavit containing legal argument, argument based on fact, and statements outside the affiant's personal knowledge.[276] However, personal knowledge does include inferences drawn from sense data and the sense data themselves.[277]

Federal Rule of Civil Procedure 56 does not set forth a blanket prohibition against hearsay in a affidavit used to support or oppose summary judgment.[278] A court may consider hearsay contained within an affidavit if such information would be admissible at trial as an exception to Federal Rule of Evidence (FRE) 802's[279] prohibition against the admission of hearsay into evidence.[280] Inadmissible hearsay may neither defeat nor support a motion for summary judgment.[281]

Federal Rule of Civil Procedure 56(e) requires that all

support attached to an affidavit be sworn or certified. Courts must disregard supporting documents that do not satisfy FRCP 56(e)'s requirements.[282] Before a court may consider supporting documentation, such evidence must be authenticated by and attached to an affidavit that satisfies FRCP 56(e)'s requirements, and the affiant must be a person through whom the document could be admitted into evidence at trial.[283]

As with other evidence submitted on a motion for summary judgment, parties to the suit waive the certification requirement if they fail to timely object.[284] The court may consider uncertified or otherwise inadmissible evidence if it is unchallenged.[285] Generally, a party may challenge the disputed evidence through a motion to strike.[286]

Federal Rule of Civil Procedure 56(c) permits the court to consider "admissions on file" when ruling on a motion for summary judgment. While admissions made pursuant to FRCP 36, including default admissions, may serve as a factual predicate for summary judgment,[287] other forms of admissions may also be considered.[288] The court may consider admissions made at the pretrial conference, during oral argument on the motion, in connection with some other discovery procedure, or pursuant to a joint statement or stipulation of counsel.[289] The court may also consider an admission made by counsel in a written brief submitted in opposition to a motion for summary judgment.[290]

However, a court may not convert an inference drawn from the record into an admission.[291]

Generally, courts will not consider other evidence that is inadmissible at trial in a motion for summary judgment. For example, in Newport Limited v. Sears, Roebuck & Co.,[292] the Fifth Circuit held that documents subject to the attorney-client privilege are inadmissible at trial and, accordingly, could not be used to defeat summary judgment.[293] Similarly, in Haavistola v. Community Fire Co. Of Rising Sun, Inc.,[294] the Fourth Circuit held that a district court abused its discretion under FRE 201(c) by taking judicial notice of adjudicative facts without any supporting evidence during a motion for summary judgment.[295]

Some courts and commentators believe that an expert's affidavit may be excluded from the summary judgment analysis if the material contained within the affidavit would be inadmissible at trial.[296] Accordingly, an expert's affidavit may be excluded if it is irrelevant, contains material more prejudicial than probative, the expert is not qualified, or the expert's opinion is not based on data reasonably relied upon by experts in that field.[297]

One unresolved issue is whether a nonmoving party may defeat a motion for summary judgment by offering an expert's affidavit that complies with the Federal Rules of Evidence, but fails to

provide the underlying facts or data supporting the expert's opinion.[298] Federal Rule of Civil Procedure 56(e) requires that a party opposing summary judgment respond by affidavits that "set forth specific facts showing that there is a genuine issue for trial."[299] However, the Federal Rules of Evidence apply generally to all civil actions and proceedings[300] and FRE 705 permits an expert to testify "without prior disclosure of the underlying facts or data, unless the court requires otherwise."[301] Further, FRE 703 states that the facts and data relied upon by the expert need not be in a form admissible at trial.[302]

Some courts take the position that an affidavit containing conclusory allegations without supporting specific facts is not saved by reference to the Federal Rules of Evidence.[303] These courts believe that regardless of the purpose of the evidentiary rules with respect to broadening the admissibility of expert opinions in general, these rules were not intended to alter the evidentiary standard necessary to defeat a motion for summary judgment.[304] Merely because a conclusionary expert report may be admissible at trial does not mean it is sufficient to defeat a properly supported motion for summary judgment.[305]

Other courts permit a party to supplement an expert's affidavit that is too conclusory to satisfy Rule 56(e).[306] The proponents of this position argue that "'the technical nature of the subject matter of such affidavits and the fluid state of the

law governing their sufficiency and admissibility' justify supplementation rather than exclusion."[307]

Recently, in M & M Medical Supplies And Service, Inc. v. Pleasant Valley Hospital, Inc.,[308] the Fourth Circuit examined the interplay between FRCP 56 and the expert testimony rules. The court opined that FRCP 56(e) "trump[ed]" the expert testimony rules with regard to the disclosure of facts.[309] With respect to the data supporting the facts, the court reconciled FRCP 56(e) with FRE 705 by concluding that neither rule required prior disclosure of the supporting data and both rules permitted supplementation of the expert's affidavit to disclose such data if the court deemed disclosure necessary.[310]

However, the court excused the expert affidavit's conclusory nature by drawing a semantic distinction between FRCP 56(e)'s requirement for specific facts and the lack of necessity of the data underlying the opinion.[311] Merely because the affidavit's failure to include supporting data does not require its exclusion under the rules of evidence does not necessarily mean that the affidavit satisfies FRCP 56(e).[312] Federal Rule of Civil Procedure 56(e) mandates that affidavits "must set forth specific facts;" the permissive nature of FRE 705 does not justify circumventing this command.[313]

In Hayes v. Douglas Dynamics, Inc.,[314] the First Circuit

articulated the proper relationship between FRCP 56 and the Federal Rules of Evidence for purposes of summary judgment. The court recognized the primacy of FRCP 56(e) over FRE 705, stating that while the nonmoving party "may rely on the affidavits of experts in order to defeat a motion for summary judgment, such evidence must still meet the standards of Rule 56."[315]

Federal Rule of Evidence 705, which permits an expert to give opinion testimony without disclosing the underlying facts or data, is "inapposite" to FRCP 56(e)'s requirement that the nonmoving party set forth specific facts establishing a triable issue.[316] Federal Rule of Evidence 705 was not drafted with summary judgment in mind; instead, it was designed to apply in the trial environment, where the parties may test the expert's conclusions by probing the underlying facts and data on cross-examination.[317] Accordingly, while evidence submitted on summary judgment must still be admissible, any conflict between the requirements of FRCP 56 and the evidentiary rules must be resolved in favor of the former.

4. Discovery Delay.--The application of the current summary judgment standard to the nonmoving party, requiring it produce sufficient evidence to create a material factual dispute, increases the importance of FRCP 56(f).[318] Both FRCP 56(f) and the Supreme Court recognize that the right to trial should not be denied simply because a litigant has not had the opportunity to

gather sufficient evidence to establish the existence of a genuine issue of material fact.[319] In Liberty Lobby, the Court opined that the nonmoving party was obligated to present "affirmative evidence" in opposition to a motion for summary judgment "even where the evidence is likely to be within the possession of the [moving party] as long as the [nonmoving party] has had a full opportunity to conduct discovery."[320] Similarly, in Celotex the Court directed that the opposing party be afforded "adequate time for discovery" before the court could grant summary judgment.[321]

Federal Rule of Civil Procedure 56(f) has not operated to seriously undermine or unnecessarily delay effective use of summary judgment.[322] Historically, courts have strictly required parties to act diligently under FRCP 56(f) and present the requisite affidavit describing the nature of the information they expect to obtain through discovery.[323] Appellate courts have generally upheld grants of summary judgment when the nonmoving party has not satisfied the Rule's requirements.[324]

A party opposing summary judgment does not possess an absolute right to additional time for discovery under FRCP 56(f).[325] This provision was not designed to act as "'a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious.'"[326] Rather, the Rule provides a

mechanism by which a party may request additional time.[327] Federal Rule of Civil Procedure 56(f) requires that a party opposing a motion for summary judgment submit an affidavit requesting a continuance in order to conduct additional discovery.[328] Generally, to satisfy FRCP 56(f)'s requirements the party seeking a continuance must submit an affidavit setting forth "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts."[329]

Federal Rule of Civil Procedure 56(f)'s requirements are not satisfied by vague assertions such as the opposing party possesses "certain information" or "other evidence.'"[330] If the party seeking a continuance cannot show how additional discovery will create a factual dispute, or if the court believes that additional discovery will prove fruitless, the court may deny the continuance and grant summary judgment.[331]

5. Multiple Attempts At Summary Judgment.--Nothing in FRCP 56 precludes multiple attempts at summary judgment. Clearly, a court's denial of summary judgment does not bar a second motion that brings different matters before the court.[332] Further, in ruling on a motion for summary judgment, a district court judge may grant the motion even if it was previously denied by a

different judge.[333] Some courts take the position that, because the denial of a motion for summary judgment is an interlocutory order, a court may reconsider its denial for any reason, even in the absence of new evidence or an intervening change in the applicable law.[334] However, a motion for summary judgment may not be made on the same grounds as a previously denied motion to dismiss or motion for judgment on the pleadings.[335]

V. Existing Mechanisms For Interlocutory Relief Following Summary Judgment Denials

A. The Final Judgment Rule

As a general rule, courts of appeal have jurisdiction, pursuant to 28 U.S.C. § 1291, to hear appeals of a district court's "final" decision.[336] For purposes of § 1291, a final decision "is generally regarded as 'a decision by the district court that ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment.'"[337] An order ensuring that the litigation remains in district court is not a final decision.[338] Accordingly, appeal is precluded from any decision "'which is tentative, informal or incomplete,' as well as from any 'fully consummated decisions, where they are but steps towards final judgment in which they will merge.'"[339]

The purpose of the final judgment rule "is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[340] The rule promotes judicial efficiency and emphasizes the deference appellate courts owe to district court decisions arising before judgment.[341] While acknowledging that immediate review of interlocutory decisions would permit more prompt correction of erroneous rulings, the Supreme Court opined that such immediate appellate review would generate unreasonable disruption, delay, and expense; and would undermine the ability of trial judges to supervise litigation.[342] Further, the Court views § 1291 as a Congressional expression of its preference to permit some erroneous district court rulings go uncorrected until appeal of the final judgment, rather than having the litigation disrupted by piecemeal appellate review.[343]

Normally, the law does not consider a district court's denial of a motion for summary judgment to be a final and immediately appealable decision.[344] The motion denial is not a final judgment, but is "'merely a judge's determination that genuine issues of material fact exist.'"[345]

As noted earlier, most jurisdictions will not permit a party to appeal a summary judgment denial after a full trial on the merits.[346] Even when summary judgment is erroneously denied, the Tenth Circuit has held that the moving party's proper redress is

through a subsequent motion at trial for judgment as a matter of law, and appellate review of that motion if denied.[347]

As a limited exception to the general rule prohibiting immediate appeal of summary judgment denials, courts will permit a party to appeal a denied motion for summary judgment when that same party appeals an order granting a cross-motion for summary judgment to an opposing party.[348] When a court of appeals reverses the grant of one party's motion for summary judgment, the court may review the denial of the other party's motion so long as it is clear that the party opposing the cross-motion had an opportunity to dispute the material facts.[349] The district court's initial grant of one motion for summary judgment is a final order that gives an appellate court jurisdiction to review the district court's denial of the opposing party's motion.[350] Significantly, the circuit court's decision to review the denial is an exercise of discretion, it is not bound to do so.[351] When exercised, that discretion is usually used to promote judicial economy.[352]

B. Interlocutory Appeal

As a statutory exception to the final judgment rule, a moving party may ask the district court to certify its order denying summary judgment pursuant to 28 U.S.C. § 1292(b).[353] This statute permits the district court to certify an order "not

otherwise appealable" to the court of appeals.[354] The order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation . . . ."[355]

Certification is within the district court's discretion[356] and courts grant them only in exceptional circumstances.[357] If the district court elects not to certify, the court of appeals is without jurisdiction to review the order denying summary judgment.[358] Additionally, the appellate court has absolute discretion to accept or reject the district court's certification.[359] By its terms, § 1292(b) is the most limited exception to the final judgment rule; unless both the district court and the court of appeals agree to an early appeal, the appeal is not heard.[360]

Interlocutory appeal presents a possible, but unlikely, avenue of appeal for summary judgment denials. In Chappell & Co. v. Frankel,[361] the Second Circuit opined that when the applicable law is clear but the district court denies a motion for summary judgment based upon a genuine issue of material fact, it is "doubtful" that the issue can properly be certified because there is no controlling issue of law to be determined.[362] Similarly, in SCI Systems., Inc. v. Solidstate Controls, Inc.,[363] the district court declined to certify its order denying summary judgment. In

denying the summary judgment motion, the district court determined that genuine issues of material facts existed regarding the defendant's laches defense.[364] Because the summary judgment denial involved a "fact-specific decision" only, the court opined that certification of an interlocutory appeal was unwarranted.[365]

C. Mandamus

The Supreme Court and all lower courts established by Congress may issue any writ "necessary or appropriate in aid of their jurisdictions and agreeable to the usages and principles of law."[366] Mandamus may be an available remedy to challenge an order that is not normally appealable because it is not final and does not fall within an exception to the finality doctrine.[367]

Although federal courts of appeal have the power to issue extraordinary writs under the All Writs Act,[368] a writ of mandamus is a disfavored remedy because its broad use interferes with the judicial policy against piecemeal appeals, and it has the unfortunate consequence of making a district court judge a litigant.[369] Even when the basic requirements for mandamus are satisfied, courts do not award mandamus relief as a matter of right, but rather grant it as an act of discretion.[370] Although frequently sought, writs of mandamus are rarely issued.[371]

Traditionally, courts will issue a writ of mandamus "only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[372] The power to issue such writs is used sparingly and invoked only in extraordinary circumstances.[373] Mandamus is not available when a judge simply erred, but has not abused his judicial authority.[374]

Before a court will issue a writ of mandamus, the party seeking it must establish that it lacks adequate alternative means to obtain the relief it seeks and its right to issuance of the writ is "'clear and indisputable.'"[375] To satisfy this heavy burden and obtain extraordinary relief, the petitioner must demonstrate a clear abuse of discretion[376] or circumstances amounting to a judicial usurpation of power.[377] The standard requires "an 'extreme need for reversal.'"[378]

An appellate court may issue a writ of mandamus when the district court commits a clear error of law arising to the level of an unauthorized exercise of judicial power, or fails to exercise its power when there is a clear duty to do so.[379] However, even with a showing of clear error that would otherwise escape review and a showing that a party's right to relief is clear and indisputable, an appellate court is not required to issue a writ of mandamus.[380]

In a rare grant of mandamus in the summary judgment context, the United States Court of Appeals For The Third Circuit held that a writ of mandamus is a proper remedy when a trial judge arbitrarily refuses to rule on a summary judgment motion.[381] In Re School Asbestos Litigation involved a nationwide products liability class action suit in which over 30,000 school districts alleged that the defendants were liable for costs associated with eliminating the dangers caused by asbestos-containing products in plaintiffs' school buildings.[382] The defendants moved for summary judgment, but the trial judge refused to rule on the motion because it was untimely, even though the judge had neither fixed a deadline for such a motion nor established a firm trial date.[383]

The circuit court held that a writ of mandamus is a proper means to force a district court to consider the merits of a summary judgment motion when it has previously refused to do so.[384] The court opined that a district court's failure to consider the merits of a motion for summary judgment when it had a duty to do so, was an improper failure to exercise its authority.[385] Significantly, however, the court limited its holding to petitions for mandamus that "do not request us to review the merits of the motions for summary judgment, but only their timeliness."[386]

While mandamus may be available to compel a judge to rule on a motion for summary judgment, mandamus is an inadequate means to

challenge the denial of a motion for summary judgment. As noted earlier, granting the writ is within the discretion of the appellate court. Further, courts have been traditionally reluctant to issue a writ of mandamus even when they believed they were empowered to do so.[387]

In the summary judgment denial context, courts have denied the writ on a number of grounds. Courts hold that the party may pursue an appeal of the denial,[388] or that such writs are reserved for extraordinary circumstances and "a garden variety denial of summary judgment motion on the ground that there is a genuine issue as to a material fact" does not rise to this level.[389] Uniformly, courts hold that writs of mandamus may not be used as a substitute for appeal,[390] "even though hardship may result from delay and perhaps unnecessary trial."[391] The fact that the moving party must bear the inherent costs of litigation -- the primary adverse consequence of an improperly denied motion for summary judgment[392] -- does not, by itself, justify the issuance of a writ.[393]

D. The Collateral Order Doctrine

In Cohen v. Beneficial Industrial Loan Corp.,[394] the Supreme Court enunciated a narrow exception to the final decision rule found at 28 U.S.C. § 1291. Cohen involved a stockholder's derivative action against the Beneficial Industrial Loan

Corporation and several of its managers and directors.[395] The complaint alleged that the individual defendants had conspired to defraud the corporation over an eighteen year period, allegedly wasting or diverting in excess of $100,000,000.[396]

Pursuant to a New Jersey statute, the defendants moved to require the plaintiff to post a $125,000 bond as security for reasonable expenses and attorney's fees in the event the plaintiff lost the case.[397] The district court refused to grant the motion, believing that the state statute was inapplicable to an action pending in federal court.[398] The court of appeals disagreed and reversed. The Supreme Court granted certiorari to determine whether the district court's order refusing to apply the state statute was an appealable order.[399]

As an exception to § 1291's final decision rule, the Court recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[400] Such decisions are treated as final judgments even though they do not end the litigation on the merits.[401] The Court held the district court's order appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[402]

Under Cohen and its progeny, to come within the collateral order exception the order must satisfy three elements: "'[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.'"[403] Unless all three elements are satisfied, the appellate court is without jurisdiction to review the order.[404]

Using this test, the Court has permitted appeals prior to criminal trials when the defendant alleged double jeopardy or a violation of the constitutional right to bail[405] because each case "'involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'"[406] Similarly, in civil cases, the Court has permitted the immediate appeal of a district court's denial of a motion to dismiss based upon a claim of absolute immunity because "'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.'"[407]

To be eligible for interlocutory review, the district court's order denying a claimed right must effectively "'render impossible any review whatsoever.'"[408] An order is effectively unreviewable "only 'where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'"[409] Accordingly, the

Court has denied immediate review of pretrial discovery orders under the rationale that such orders may be appealed after final judgment or "in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling."[410] In Firestone Tire & Rubber Co. v. Risjord, the Court held that an order refusing to disqualify counsel was not immediately appealable because the petitioner failed to establish "that its opportunity for meaningful review will perish unless immediate appeal is permitted."[411]

In Chappell & Co. v. Frankel,[412] the Second Circuit directly addressed the issue whether a court of appeals had jurisdiction to review the denial of summary judgment based upon the collateral order doctrine. In Chappell the plaintiffs filed a copyright infringement suit alleging that the defendant corporations were illegally manufacturing and selling certain phonograph records.[413] The defendant sought summary judgment on the basis that his corporations had been licensed to manufacture and sell the phonograph records containing the compositions allegedly subject to plaintiffs' copyrights.[414]

The district court denied summary judgment, finding a genuine issue whether the defendant had been issued licenses for the disputed musical compositions.[415] After a three judge panel

from the Second Circuit affirmed the denial, the Second Circuit, acting en banc, agreed to consider the issue and unanimously affirmed.[416]

As a preliminary matter, the court noted that it was beyond dispute that an order denying a motion for summary judgment was not a final decision within the meaning of 28 U.S.C. § 1291.[417] Further, the court rejected the application of the collateral order doctrine because the denial "was directly concerned with the merits of [the defendant's] substantive claim for relief . . . ."[418]

The only orders that the Supreme Court has found to satisfy the collateral order doctrine are those orders involving a right that will be "'irretrievably lost'" if not immediately appealed, such as immunity from suit.[419] A right that equates with a mere defense to liability, rather than an immunity from suit, does not suffice.[420] Even if the litigation is determined to be ultimately unnecessary, the trouble and expense of litigation does not qualify an order as collateral and appealable.[421] To be appealable, the order must threaten a legal right with irreparable harm.[422]

E. Summary: Inadequate Mechanism For Relief

Requiring a moving party, who is clearly entitled to summary

judgment, to wait until trial to renew its motion for summary judgment through the medium of a motion for judgment as a matter of law, and appellate review of that motion if denied, is clearly unjust[423] and requires correction. Under this remedial scheme, a party who should not be going to trial at all, must suffer the cost, inconvenience, and risk associated with preparing for and litigating the case. This scheme permits a district court judge and the nonmoving party to circumvent FRCP 56's requirement at will.

The current mechanisms for appellate review of erroneous summary judgment denials are inadequate. Section 1292(b) fails because it affords too much discretion to the district court to refuse certification for appellate review.[424] Further, a district court's denial of a motion for summary judgment based upon a misperceived genuine issue of material fact is unlikely to qualify as a controlling question of law as to which there is substantial ground for difference of opinion.[425] The collateral order doctrine is unsatisfactory because of its narrow application to those orders qualifying as collateral and for which delayed review would cause irreparable harm.[426] Further, mandamus is a disfavored remedy that is rarely granted even when a petitioner has established its entitlement to such relief.[427]

VI. A Modest Proposal: Permit Immediate Appeals

A. Extend The Cohen Exception

Although current collateral order doctrine precedent does not favor appellate review of summary judgment denials, the Supreme Court could easily extend the doctrine to permit such appeals.

1. The First Prong Of The Cohen Test.--To satisfy the first prong of the Cohen test, the order denying a motion for summary judgment must "'conclusively determine the disputed question.'"[428] However, since rendering its decision in Cohen, the Court has elaborated on the test's first prong. In Moses H. Cone Memorial Hospital v. Mercury Const. Corp.,[429] the Court distinguished between orders that were "inherently tentative" and those "that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed.'"[430] Inherently tentative orders are those "as to which some revision might reasonably be expected."[431]

In one respect, a summary judgment denial does not satisfy the test's first prong because the moving party may still succeed in proving its version of the facts at trial.[432] Further, the trial judge always retains the authority to revise his order denying summary judgment sua sponte or after a second motion is filed.[433]

If viewed from a different perspective, the denial of summary judgment "finally and conclusively determines the [moving party's] claim of right not to stand trial on the [opposing party's] allegations."[434] Unless the moving party assumes the unnecessary burden of presenting further evidence to the court negating the opposing party's claim or defense,[435] it is unlikely that the district court will reverse itself and grant summary judgment. Because there are no further steps that the moving party may realistically take to avoid trial, the Cohen test's threshold requirement of a fully consummated decision is satisfied.[436] Further, when the moving party actually litigates and loses a trial on the merits, it has no avenue of relief to challenge the denied motion.[437]

Additionally, it is extremely unlikely that a district court judge will, sua sponte, reverse his prior order denying summary judgment. Unless the moving party discovers additional, persuasive evidence prior to trial, a second attempt at summary judgment would be futile. The mere existence of a remote possibility of revision does not render the denial order inherently tentative.[438] Realistically, a district court's order denying a motion for summary judgment is not an inherently tentative order; it is the final word on the issue.

2. The Second Prong Of The Cohen Test.--The second portion of the Cohen test requires that the order resolve "an important

issue completely separate from the merits of the action . . . ."[439] Granting a motion for summary judgment involves an adjudication on the merits[440] and, at first glance, a denial of summary judgment would seem to fail this portion of the Cohen test. The Second Circuit took this position in Chappell & Co. v. Frankel.[441]

However, a court's determination that FRCP 56's legal requirements have not been satisfied is conceptually distinct from the merits of the parties' claims. Indeed, in Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.,[442] the Supreme Court stated broadly that "the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim."[443] The denial is simply a pretrial order determining that the case should go to trial.[444]

When reviewing a motion for summary judgment, the trial judge makes a determination whether the moving party is entitled to summary judgment as a "matter of law."[445] It is not the judge's function to weight the evidence and determine the truth of the matter.[446] The judge merely determines whether there is a genuine issue for trial.[447] Indeed, in making this determination, the judge must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor.[448] In essence, the trial judge does not

delve into the merits of the case; he merely makes the legal determination whether, based on the available record, there is an issue that needs to be determined at trial. Federal Rule of Civil Procedure 56 requires a judge to "examine the legal significance of the undisputed facts in order to determine whether they establish that 'the moving party is entitled to judgment as a matter of law.'"[449]

3. The Third Prong Of The Cohen Test.--The improper denial of a motion for summary judgment denies the moving party its right not to stand trial when the requirements of Rule 56 have been satisfied. In certain contexts, a right not to stand trial will satisfy the third prong of the Cohen test.[450] However, it is uncertain whether this particular right to avoid trial is the type of right envisioned under Cohen and its progeny. Theoretically, any litigant who has "a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial," but not all such rights fall within the "narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal."[451]

The Court has held that an order denying absolute or qualified immunity is immediately appealable because the essential attribute of the immunity defense is the right "'not to stand trial under certain circumstances' and thus is 'an immunity from suit rather than a mere defense to liability.'"[452] In a

similar vein, some courts have held that appellate jurisdiction exists over denied motions for summary judgments that are based upon a prior release from liability, either in the form of a general release by a terminated employee or a settlement agreement of ongoing litigation.[453] To meet the requirements of Cohen, these courts have characterized such releases as creating "not only a defense to liability but also an immunity from trial."[454]

In Midland Asphalt Corp. v. United States, the Supreme Court -- in a criminal case -- narrowly construed the third prong of the Cohen test with regard to the right not to stand trial. The Court pointed out a party could argue that "any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss . . . or terminate the trial."[455] However, such a broad application of the right does not satisfy the requirements for the collateral order doctrine exception to the final judgment rule.[456] The Court opined that there exists a "'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'"[457] Accordingly, the Court limited the right not to stand trial for purposes of the Cohen test to cases where there exists an "explicit statutory or constitutional guarantee that trial will not occur -- as in the Double Jeopardy Clause . . . or the Speech or Debate Clause . . . ."[458]

While the Court's stringent requirement in Midland Asphalt Corp. that there be an explicit statutory or constitutional basis for the right not to stand trial should be limited to the criminal context,[459] the decision is a warning from the Court that lower courts must exercise restraint when determining whether a legal right includes protection from the exigencies of trial.[460] Regardless, in the civil context a party must establish at a minimum that the "'essence' of the claimed right is a right not to stand trial,'"[461] it is a right "to avoid suit altogether."[462]

Although the gravamen of the right to summary judgment is an entitlement not to stand trial because the moving party is entitled to judgment as a matter of law, the narrow scope of the collateral order doctrine does not appear currently to embrace the erroneous denial of a summary judgment motion. As an illustration, in Van Cauwenberghe v. Biard,[463] the Court held that the denial of a motion to dismiss based upon an extradited defendant's immunity from civil process was not immediately appealable because the "right not to be burdened with a civil trial itself is not an essential aspect of this protection."[464]

The most notable consequence of a summary judgment denial is that the moving party must bear the cost and inconvenience of litigation. As a general rule, the courts have held that the burden and expense of unnecessary litigation is insufficient to warrant an immediate appeal of a pretrial order."[465]

The Supreme Court could easily extend the collateral order doctrine's third prong to embrace summary judgment denials. Clearly, summary judgment entails some form of a right not to be subjected to a trial on the merits.[466] While this right does not rise to the level of a constitutional or statutory right, it is not a right without significant importance. Federal Rule of Civil Procedure 56 was approved by the Judicial Conference of the United States, the Supreme Court of the United States, and Congress;[467] and it enjoys the force and effect of law.[468]

In other contexts, courts permit immediate appeal under the collateral order doctrine of decisions that do not deny a constitutional or statutory right. As an illustration, neither the Constitution nor any statute require the appointment of counsel in a civil case.[469] Moreover, no statute specifically authorizes the appeal of a decision denying appointment of counsel.[470] Nevertheless, four circuits permit immediate appeal under the collateral order doctrine of such denials,[471] emphasizing the hardship, injustice, or irreparable prejudice that may result from an erroneous denial of a motion to appoint counsel.[472]

B. Create A New Rule For Interlocutory Appeal

The Federal Rules of Civil Procedure were designed to

"secure the just, speedy, and inexpensive determination of every action."[473] Permitting immediate appeals of summary judgment motions would further this goal in cases where such motions are improperly denied.[474] Litigants would not be required to suffer the delay and expense associated with preparing for trial when they are clearly entitled to summary judgment.

The primary policy reason supporting the general rule against interlocutory appeals of nonfinal orders is to avoid piecemeal appeals.[475] The courts are willing to accept infliction of some degree of harm upon a litigant in order to satisfy the need for efficient judicial administration and to avoid the delay and burden associated with piecemeal review of a district court's decisions.[476]

Permitting interlocutory appeal of a summary judgment denial does not constitute piecemeal review of a district court's decisions because, if successful, the appealing party would be entitled to a complete resolution of the case on the merits. Theoretically, if an appellate court were to reverse such a denial, determining that as a matter of law the moving party was entitled to judgment, upon remand the district court would perform no function beyond granting the motion and ending the case.[477]

Recently, Congress has provided the Supreme Court with the

authority to prescribe rules both defining when an order is final for purposes of 28 U.S.C. § 1291, and determining when an order that is not final may nevertheless be appealed under 28 U.S.C. § 1292.[478] Section 315 of the Judicial Improvements Act of 1990[479] gave the Court authority to "define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ."[480] Section 101 of the Federal Courts Administration Act of 1992[481] amended 28 U.S.C. § 1292 to permit the Court to prescribe rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under section 1292.[482]

Other than a desire to implement a recommendation of the Federal Courts Study Committee,[483] the legislative history of these two statutory provisions provides little information concerning congressional intent in enacting the changes.[484] The Federal Courts Study Committee encouraged the Court to expand the list of interlocutory decisions that may be appealed.[485] By adopting the Committee's recommendation, Congress intended that interlocutory appeals be made more readily available.[486] Further, the language of § 1292(e), which provides for the Court to designate rules permitting interlocutory appeals "not otherwise provided for," indicates that any such rule may enlarge the list of appealable interlocutory orders, but may not curtail it.[487]

Under this new legislation, the Supreme Court may permit

interlocutory appeals of summary judgment denials in two ways. First, the Court may designate denial orders as final for purposes of § 1291. This approach would grant the moving party an appeal of right.[488] The obvious drawback to this approach is the potential for overwhelming an already overburdened[489] appellate court system with appeals.

The second, and better, approach is to define appealable interlocutory orders under 28 U.S.C. § 1292(e) in such a manner as to permit appeal of the most meritorious denial orders without opening the appellate floodgates. Its new rulemaking authority allows the Court to create interlocutory appeal rules that include discretionary conditions like those found in section 1292(b) or like those seen when seeking a writ of mandamus.[490]

Assuming that the Court were to permit some form of discretionary review of summary judgment denials, three potential schemes are available to accomplish interlocutory review:

(1) Review initiated by a party, directly to the appellate court, with appellate court option to accept;

(2) Review initiated by a party, requiring trial judge concurrence, and with appellate court option to accept; or

(3) Review initiated by a party, requiring trial judge concurrence, but without appellate court option to accept.[491]

Options two and three are inadequate because they require the trial judge to be objective about the wisdom of his own denial

order.[492] Particularly when the trial judge has denied summary judgment for subjective reasons, e.g. individual notions of justice, it is extremely unlikely that the trial judge would concur in the appeal.

Option one maintains a proper balance between avoiding burdensome appeals with affording justice to a litigant, who has clearly satisfied FRCP 56's requirements and is entitled to judgment as a matter of law. The aggrieved party has an avenue of immediate appeal to challenge a clearly erroneous summary judgment denial order and the court of appeals retains the means to screen nonmeritorious appeals.

VII. Conclusion

The Supreme Court's decisions in Matsushita, Celotex, and Liberty Lobby encouraged lower courts to use FRCP 56 as a means of disposing of factually unsupported cases prior to trial. The Court clarified the law in this area and held out summary judgment as a useful -- if not favored -- procedural device for resolving litigation in a just, speedy, and inexpensive manner. A court should not deny a properly supported motion for summary judgment either because the case involves complex issues of fact or law or because the litigation embraces issues of intent or motivation. Further, the Court has indicated that once a moving party has satisfied FRCP 56's requirements, summary judgment is

mandated. The district court judge must enter summary judgment; he is without discretion to act otherwise.

As with all Federal Rules of Civil Procedure, parties to a lawsuit are entitled to rely on FRCP 56 and federal district court judges are obligated to follow it. These rules have the force and effect of law.[493] Judges do not "possess the authority to circumvent, ignore or deviate from the Federal Rules of Civil Procedure, which were approved by the Judicial Conference of the United States, the Supreme Court of the United States, and Congress."[494]

Unfortunately, not all district court judges understand or adhere to the precepts governing summary judgment. Further, despite the importance of FRCP 56 and the Supreme Court's emphasis on summary procedure, the legal system has failed to provide an adequate mechanism by which a party erroneously denied a properly supported motion for summary judgment may seek relief. This deficiency in the legal system subjects litigants to unnecessary delay and expense, and exacerbates the problems of an already overburdened judicial system. A defendant must elect between settling a case in which it is not liable or assume the costs and risks of defending itself at trial before an unpredictable judge or jury. Even if successful, the defendant's financial expenditures associated with the judicial success may render such triumph a Pyrrhic victory.

1. William W. Schwarzer, Summary Judgment Under The Federal Rules: Defining Genuine Issues Of Material Fact, 99 F.R.D. 465 (1984) (citing FED. R. CIV. P. 1); see also Zavislak v. United States, 29 Fed. Cl. 525, 527-28 (1993).

2. Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993) (Age Discrimination in Employment Act); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035 (7th Cir. 1993) (Civil Rights Act of 1964); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993) (Rehabilitation Act of 1973).

3. In re Haste, 2 F.3d 1042 (10th Cir. 1993) (bankruptcy court granted summary judgment, holding that under Oklahoma law perfected security interest in stock did not continue in the dividends).

4. Cooper v. United States, 827 F. Supp. 1309 (E.D. Mich. 1993, (challenging liability for withholding tax delinquencies).

5. Carroll Touch v. Electro Mechanical Sys., 3 F.3d 404 (Fed. Cir. 1993) (affirming summary judgment in patent infringement case); Accent Designs, Inc. v. Jan Jewelry Designs, Inc., 827 F. Supp. 957 (S.D.N.Y. 1993) (patent holder's allegations of infringement).

6. Baugh v. CBS, Inc., 828 F. Supp. 745, 752 (N.D. Cal. 1993)

("Summary disposition is particularly favored in cases involving First Amendment rights."); see also Johnson v. Robbinsdale Ind. School Dist. 281, 827 F. Supp. 1439, 1442 (D. Minn. 1993) (summary judgment "is favored in defamation cases involving public officials because it prevents the discouragement of full and free expression of a person's First Amendment rights concerning the conduct of their government.").

7. United States v. Breyer, 829 F. Supp. 773, 775 (E.D. Pa. 1993) ("Even with the heavy burden of proof placed upon the government in naturalization cases, summary judgment remains applicable in such actions.").

8. McKinley v. Afram Lines (USA) Co., 834 F. Supp. 510, 514 (D. Mass. 1993) ("The standard for allowance of a summary judgment motion in an admiralty case is synonymous with that applied in non-admiralty cases.").

9. United States v. 717 S. Woodward St., 2 F.3d 529, 532 (3rd Cir. 1993) (citations omitted); United States v. Eleven Vehicles, 836 F. Supp. 1147 (E.D. Pa. 1993); United States v. $319,603.42 In United States Currency, 829 F. Supp. 1223 (D. Or. 1992) ("In a civil forfeiture case, the summary judgment procedures must be construed in light of the statutory law of civil forfeitures, and particularly the procedural requirements of such cases.").

10. Celotex Corp. v. Catrett, 477 U.S. 321, 324 (1986) ("isolate

and dispose of factually unsupported claims or defenses"); Harris v. Roberts, 817 F. Supp. 895 (D. Kan. 1993); Southern v. Emery Worldwide, 788 F. Supp. 894, 895 (S.D. W.Va. 1992) ("isolate and dispose of meritless litigation.").

11. 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712, at 564-67 (1983); see JACK H. FRIEDENTHAL ET. AL., CIVIL PROCEDURE § 9.1, at 434 (1985) ("the main purpose of summary judgment is to avoid useless trials . . . ."); see also Bourne v. Tahoe Regional Planning Agency, 829 F. Supp. 1203, 1205 (D. Nev. 1993) ("avoid unnecessary trials when there is no dispute as to the facts before the court."); In re Southeast Banking Corp., 827 F. Supp. 742, 752 (S.D. Fla. 1993) ("purpose of Rule 56 is to eliminate the needless delay and expense to the parties and to the court occasioned by an unnecessary trial.").

12. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

13. FRIEDENTHAL, supra note 11 §9.1, at 433.

14. Id. at 434-35. Summary judgment is appropriate to resolve issues of law, such as the meaning of statutes. WKB Enter., Inc. v. Ruan Leasing Co., 838 F. Supp. 529, 532 (D. Utah 1993).

15. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Harris v. Palmetto Tile, Inc., 835 F. Supp. 263, 264 (D.S.C. 1993); Independent Drug Wholesalers Group, Inc. v. Denton, 833 F.

Supp. 1507, 1514 (D. Kan. 1993); Collins v. Kahelski, 828 F. Supp. 614, 618 (E.D. Wisc. 1993); Heredia v. Johnson, 827 F. Supp. 1522, 1524 (D. Nev. 1993); Butler v. Navistar Int'l Transp. Corp., 809 F. Supp. 1202, 1205 (W.D. Va. 1991).

16. Celotex, 477 U.S. at 322 (emphasis added); see also McDermott Int'l, Inc. v. Wilander, 111 S.Ct. 807, 818 (1991) ("mandated"); Real Estate Fin. v. Resolution Trust Corp., 950 F.2d 1540, 1543 (11th Cir. 1992) ("must grant"); Idaho Farm Bureau Fed'n v. Babbitt, 839 F. Supp. 739, 744 (D. Idaho 1993) (summary judgment is mandated); Security Serv. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("must enter summary judgment"); Marrero Garcia v. Irizarry, 829 F. Supp. 523, 526 (D. P.R. 1993) ("mandates"); Kauffman v. Kent State Univ., 815 F. Supp. 1077, 1081 (N.D. Ohio 1993) ("mandates"); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399, 1402 (D. Minn. 1992) ("must grant"); Allstate Ins. Co. v. Norris, 795 F. Supp. 272, 274 (S.D. Ind. 1992) ("when the standard embraced in Rule 56(c) is met, summary judgment is mandatory."); Colizza v. United States Steel Corp., 49 Fed. Empl. Practice Cases (BNA) 779, 781 (W.D. Pa. 1989) ("mandates"). But cf. Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989) ("A district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.").

17. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

18. Drewitt v. Pratt, 999 F.2d 774, 778-79 (4th Cir. 1993); Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479, 483 (4th Cir. 1989) (Murnaghan, C.J., concurring); Felty v. Graves-Humphreys, 818 F.2d 1126, 1128 (4th Cir. 1987).

19. Celotex Corp. v. Catrett, 477 U.S. 325, 326 (1986); Yu v. Peterson, 13 F.3d 1413, 1415 n.3 (10th Cir. 1994); Balogun v. Immigration And Naturalization Service, 9 F.3d 347, 352 (5th Cir. 1993) ("governed by Rule 56's requirement of ten days notice and an opportunity to respond."); Stells v. Town of Tewksbury, Mass., 4 F.3d 53 (1st Cir. 1993); Waterbury v. T.G. & Y Stores Co., 820 F.2d 1479, 1480 (9th Cir. 1987) ("a district court may grant a summary judgment sua sponte if the losing party 'had a full and fail opportunity to ventilate the issues involved in the motion.'") (citation omitted); Triomphe Investors v. City of Northwood, 835 F. Supp. 1036, 1046 & n.9 (N.D. Ohio 1993) (sua sponte grant of summary judgment); McLaughlin v. Compton, 834 F. Supp. 743, 746 (E.D. Pa. 1993) (court may award summary judgment to nonmoving party without necessity of formal cross-motion); Jacobson v. Cohen, 151 F.R.D. 526, 528 (S.D.N.Y. 1993); see also 10A WRIGHT, supra note 11 §2720, at 27-28 (If it provides advance notice and an opportunity to demonstrate why summary judgment is inappropriate, the court may act sua sponte).

20. John P. Frank, The Rules Of Civil Procedure -- Agenda For Reform, 137 U. PA. L. REV. 1883, 1894 (1989) ("many of the lower courts . . . still are caught in the 'any factual dispute' notion as a reason for denying summary judgment without evaluating whether the factual dispute really is of any legal consequence."); Paul D. Carrington, Making Rules To Dispose Of Manifestly Unfounded Assertions: An Exorcism Of The Body Of Non-Trans-Substantive Rules Of Civil Procedure, 137 U. PA. L. REV. 2067, 2097 (1989) ("Rule 56 has been enfeebled by courts reluctant to take responsibility for asserting the genuineness of contentions."); see also Buenrostro v. Collazo, 973 F.2d 39, 42 n.2 (1st Cir. 1992) ("We recognize that, in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed."); Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989) ("A district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.").

21. See Jack H. Friedenthal, Cases on Summary Judgment: Has There Been a Material Change in Standards?, 63 NOTRE DAME L. REV. 770, 780 (1988) ("'many courts persist in denying summary judgment in cases in which a directed verdict might well be granted, merely on the basis of the ill-conceived belief that

justice always is better served by permitting the litigant a day in court.'") (citation omitted); id. at 787 (the failure of courts to properly analyze aspects of summary judgment have resulted in improperly denied motions).

22. Denial of a motion of summary judgment based upon a claim of absolute or qualified immunity falls within the collateral order doctrine exception to the general rule against immediate appellate review. Puerto Rico Aqueduct And Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993); Mitchell v. Forsyth, 472 U.S. 511, 526-28 (1985); Latimore v. Johnson, 7 F.3d 709, 711 n.1 (8th Cir. 1993); Harris v. Coweta County, 5 F.3d 507, 510 (11th Cir. 1993); Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir. 1992); see generally infra notes 394-422 and accompanying text. The denial of an official qualified-immunity status is immediately appealable because it "'conclusively determines the defendant's right not to stand trial.'" Mitchell, 472 U.S. at 527 (emphasis in original); Reed v. Woodruff County, Ark., 7 F.3d 808, 810 (8th Cir. 1993). Further, denial of a motion for summary judgment that has the practical effect of dismissing the case with prejudice is a final, appealable order. Lody v. Secretary of Health, Educ. and Welfare, 451 F.2d 871, 872 (9th Cir. 1971) (record review of disability determination).

23. 10 WRIGHT, supra note 11 § 2715, at 636; 4 AM. JUR. 2D Appeal And Error § 104, at 622 (1962) ("the denial of a motion for

summary judgment is an interlocutory decision only and therefore not directly appealable . . . ."); see also Pacific Union Conf. Of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306 (1977); Reed v. Woodruff County, Arkansas, 7 F.3d 808, 809-10 (8th Cir. 1993) ("not a final order and is therefore not usually appealable until the conclusion of the case on the merits."); Harris v. Coweta County, 5 F.3d 507, 510 (11th Cir. 1993) ("denial of a motion for summary judgment is not a final decision and no appeal lies from it."); McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 253 (10th Cir. 1993) (ordinarily not an appealable final order); Manion v. Evans, 986 F.2d 1036, 1038 (6th Cir. 1993) (not a final order); Jones-Hamilton v. Beazer Materials & Serv., 973 F.2d 688, 691-92 (9th Cir. 1992); Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991) ("general principle that a denial of a motion for summary judgment is not a reviewable final decision."); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 353 n.55 (7th Cir. 1988) ("interlocutory and thus nonappealable."); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278-79 (5th Cir. Unit A Mar. 1981); Valdosta Livestock Co. v. Williams, 316 F.2d 188 (4th Cir. 1963). A court's denial of a motion to reconsider the denial of a summary judgment motion is also not an appealable order. Pruett v. Choctaw County, Alabama, 9 F.3d 96 (11th Cir. 1993).

24. Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 24-25 (1966); EEOC v. Sears, Roebuck & Co., 839 F.2d

303, 353 n.55 (7th Cir. 1988); Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971).

25. Jones-Hamilton v. Beazer Materials & Serv., 973 F.2d 688, 694 n.2 (9th Cir. 1992); United States v. 228 Acres Of Land and Dwelling, 916 F.2d 808, 811 (2d Cir. 1990); Sears, Roebuck & Co., 839 F.2d at 353 n.55.

26. Schmidt v. Farm Credit Serv., 977 F.2d 511, 513 n.3 (10th Cir. 1992); Lum v. City And County of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992) ("hold that there is no need to review denials of summary judgment after there has been a trial on the merits."); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) ("Denial of summary judgment is not properly reviewable on appeal from a final judgment entered after a full trial on the merits."); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990) ("hold that where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed."); Holley v. Northrop Worldwide Aircraft Serv., Inc., 835 F.2d 1375, 1378 (11th Cir. 1988) ("a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which mitigate against his case."); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986) ("a denial of summary judgment is not properly reviewable on an appeal from the

final judgment entered after trial."), cert. dismissed, 479 U.S. 1072 (1987). Appellate courts will not overturn a verdict based upon the erroneous denial of summary judgment. Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 n.4 (10th Cir. 1992) (unable to find such a case), cert. denied, 113 S.Ct. 1417 (1993); Jarrett, 896 F.2d at 1016 n.1 ("After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied.").

27. It would be intellectually dishonest to assert that all juries base their decisions on the facts and law. Unfortunately, some juries decide cases based upon "sympathy, antipathy or private notions of justice." Cf. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) (tacitly recognizing the existence of such juries).

28. Marc S. Galanter, The Federal Rules And The Quality Of Settlements: A Comment On Rosenburg's, The Federal Rules Of Civil Procedure In Action, 137 U. PA. L. REV. 2231, 2233 (1989) ("tremendous push in recent years to encourage settlement with an eye to lowering the demands on courts.").

29. Donald F. Turner, Private Antitrust Enforcement: Policy Recommendations, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 407 (Lawrence J. White ed., 1988) ("[A] substantial number of private antitrust cases are ill-founded, brought in hopes of obtaining substantial cash settlements from defendants

seeking to avoid the costs of litigation and the risk that bits of evidence will lead to adverse jury verdicts.").

30. 10 WRIGHT, supra note 11 § 2713, at 592; see also Nichols v. Mower's News Serv., Inc., 492 F. Supp. 258, 260 (D. Vt. 1980) ("dismissal for lack of subject matter jurisdiction is a matter of abatement in that it does not bar future actions . . . .").

31. 10 WRIGHT, supra note 11 § 2713, at 593; see also Ruich v. Ruff, Weidenaar & Reily, Ltd., 837 F. Supp. 881, 883 (N.D. Ill. 1993) ("motion to dismiss concerns the sufficiency of the complaint, not the merits of the suit.").

32. 10 WRIGHT, supra note 11 § 2713, at 593; see also J.K. By And Through R.K. v. Dillenberg, 836 F. Supp. 694 (D. Ariz. 1993) (tests the formal sufficiency of the pleadings and not the merits); Janopoulos v. Harvey L. Walner & Assoc., 835 F. Supp. 459, 460 (N.D. Ill. 1993) ("motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the suit."); Wolford v. Budd Co., 149 F.R.D. 127, 129 (W.D. Va. 1993) ("test only whether the claim has been adequately stated . . . .").

33. 10 WRIGHT, supra note 11 § 2713, at 593.

34. Id.

35. Id. at 593-94.

36. FRIEDENTHAL, supra note 11 § 9.1, at 434.

37. Id. ("when the moving party introduces outside matters and clearly intends to test not only whether the allegations are sufficient on their face to state a claim, but also whether there is any factual basis for those allegations."); see also Building And Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1495 (10th Cir. 1993) ("Fed.R.Civ. P. 12(b) states that, where a Rule 12(b)(6) motion raises matters outside the pleadings, it shall be treated as a motion for summary judgment subject to the requirements of Fed.R.Civ.P. 56."); Green v. Forney Eng'g Co., 589 F.2d 243, 246 n.7 (5th Cir. 1979) (12(b)(6) motion converted into a motion for summary judgment); Siderpali, S.P.A. v. Judal Indus., Inc., 833 F. Supp. 1023, 1030 (S.D.N.Y. 1993) (12(c) motion treated as motion for summary judgment); Gurfein v. Sovereign Group, 826 F. Supp. 890, 898 (E.D. Pa. 1993) ("a court may not consider materials outside the pleadings and the briefs without converting a motion to dismiss into a motion for summary judgment."); Mason v. County Of Delaware Sheriff's Dep't, 150 F.R.D. 27, 29 (N.D.N.Y. 1993) (12(b)(6) motion must be treated as one for summary judgment); Wolford v. Budd Co., 149 F.R.D. 127, 132 (W.D. Va. 1993) ("could" treat 12(b)(6) motion as one for summary judgment); Flax v. United States, 791 F. Supp. 1035, 1038 n.2 (D. N.J. 1992) (12(b)(6) motion "treated as a motion for

summary judgment."). The failure to provide adequate notice to the parties that a motion to dismiss will be treated as a motion for summary judgment is reversible error. Rockwell Int'l Corp., 7 F.3d at 1496

38. KENT SINCLAIR, SINCLAIR ON FEDERAL CIVIL PROCEDURE § 8.12, at 426 (3rd ed. 1992); see also Palm v. United States, 835 F. Supp. 512, 515 n.1 (N.D. Cal. 1993) ("If the court does not rely on the extraneous matters, the motion to dismiss will not be converted into a motion for summary judgment."); cf. Snyder v. Talbot, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (within the court's discretion to consider additional materials in deciding a 12(b)(6) motion).

39. FRIEDENTHAL, supra note 11 § 9.1, at 434.

40. Id. at 434 n.10.

41. Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993); see also Green v. Forney Engineering Co., 589 F.2d 243, 246 (5th Cir. 1979) ("may consider outside matters which are attached to a motion to dismiss without first converting it into a motion for summary judgment . . . ."); Palumbo v. Roberti, 834 F. Supp. 46, 50 (D. Mass. 1993); Southeast Bank v. Gold Coast Graphics Group, 149 F.R.D. 681, 684 n.2 (S.D. Fla. 1993) ("a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction cannot be converted into a motion for summary judgment."); Nichol's v. Mower's News Serv., Inc., 492 F. Supp.

258, 260 (D. Vt. 1980) (may consider evidentiary material without converting a 12(b)(1) motion into a motion for summary judgment).

42. Capitol Leasing Co., 999 F.2d at 191; Palumbo, 834 F. Supp. at 50 (unrelated to the merits).

43. Robert W. Millar, Three American Ventures In Summary Civil Procedure, 38 YALE L.J. 193, 194 (1928). Summary procedure in Continental Europe was guided by the principle of the Roman summatim cognoscere. Italian jurists applied a form of summary procedure prescribed by Pope Clement V's decretal Saepe contingit, which influenced the subsequent development of most of the modern Continental civil systems and Anglo-American chancery and admiralty procedures. Id. For a discussion of Roman civil procedure see generally P. VAN WARMELO, AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW (1976); HESSEL E. YNTEMA & A. ARTHUR SCHILLER, SOURCE BOOK OF ROMAN LAW (1929).

44. Weather-Rite Sportswear Co. v. United States, 298 F. Supp. 508, 511 n.5 (Cust. Ct. 1969).

45. John A. Bauman, The Evolution Of The Summary Judgment Procedure, 31 IND. L.J. 329, 330 (1956).

46. Id. at 331.

47. Id. Several other factors contributed to the decline of the

piepowder courts including the disruptive effects of the Hundred Years' War on credit transactions, the development of negotiable instruments, and the failure to develop early commercial courts. Id.

48. Id. at 331-33.

49. Id.

50. Summary Procedure on Bills of Exchange Act, 18 & 19 Vict., c. 67 (1855). The Act required the plaintiff to obtain a writ warning the defendant that judgment would be entered against him unless the defendant obtained leave of court to appear and defend himself within twelve days of service of the writ. The court would grant such leave only if the defendant paid to the court the amount demanded in the writ, or provided affidavits raising a defense to the action. Bauman, supra note 45, at 338-39.

51. Bauman, supra note 45, at 329-30; 10 WRIGHT, supra note 11 § 2711, at 556. In 1681, Scotland enacted a summary procedure on foreign bills of exchange to facilitate international trade. By 1696, Scottish law had extended this procedure, known as "summary diligence," to other commercial instruments. Bauman, supra note 45, at 336.

52. 10 WRIGHT, supra note 11 § 2711, at 556. The procedure did not apply to a limited number of torts and to breach of promise to marry proceedings. Id.

53. Bauman, supra note 45, at 343; 10 WRIGHT, supra note 11 § 2711, at 556; Jack B. Weinstein, The Ghost Of Process Past: The Fiftieth Anniversary Of The Federal Rules Of Civil Procedure And Erie, 54 BROOK. L. REV. 1, 4 (1988) ("State procedures in the early nineteenth century were based on a received, modified English common law practice."); see also Weather-Rite Sportswear v. United States, 298 F. Supp. 508, 511-12 (Cust. Ct. 1969) ("'some of the most fruitful recent innovations in the realm of civil procedure (such as summary judgment) originated in the rule-making of the English judges.'"). Some states, notably Virginia, attempted to simply the English writ and complaint requirements and develop true summary procedures. Bauman, supra note 45, at 343. In 1732, Virginia initiated a limited notice and motion for judgment procedure that was greatly expanded in 1849, applying to all common law actions. Id.

54. Weinstein, supra note 53, at 4-5.

55. Bauman, supra note 45, at 342.

56. FRIEDENTHAL, supra note 11 § 9.1.

57. Id. Such a procedure was commonly referred to as "speaking demurrers." Id.

58. Id.

59. Bauman, supra note 45, 342-43. Some jurisdictions were

unable to develop adequate standards for determining whether the pleading was sham. It was unclear whether a pleading was sham only if filed in bad faith or because existing evidence clearly refuted it. Additionally, some jurisdictions were unable to establish the type and quantum of evidence necessary to strike the pleading. FRIEDENTHAL, supra note 11 § 9.1.

60. Bauman, supra note 45, at 342-43.

61. Weinstein, supra note 53, at 6.

62. Id.

63. Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197. The Conformity Act required that the civil procedure employed by individual federal courts conform as closely as possible with the procedure of the state in which the federal court sat. Stephen N. Subrin, Federal Rules, Local Rules, And State Rules: Uniformity, Divergence, And Emerging Procedural Patterns, 137 U. PA. L. REV. 1999, 2002 (1989). The Act did not apply to equity and admiralty cases. Id.

64. Weinstein, supra note 53, at 5-6. When federal procedural statutes and practices took precedence over conformity with state law, federal judges refused to apply the state procedures. Subrin, supra note 63, at 2002.

65. 10 WRIGHT, supra note 11 § 2711, at 557.

66. Id.

67. Weather-Rite Sportswear v. United States, 298 F. Supp. 508, 512 (Cust. Ct. 1969) (citation omitted).

68. 10 WRIGHT, supra note 11 § 2711, at 556. The scope of these categories expanded over time. Id.

69. Bauman, supra note 45, at 344 & n.115.

70. Id. at 344.

71. Act of June 19, 1934, ch. 651, §§ 1 &2, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1982)).

72. Jack B. Weinstein, After Fifty Years Of The Federal Rules Of Civil Procedure: Are The Barriers To Justice Being Raised?, 137 U. PA. L. REV. 1901 (1989). The Supreme Court transmitted the Rules to the Attorney General on December 20, 1937, who presented them to Congress on January 3, 1938. Id. For a discussion of the 1938 version of the Rules see generally LAWRENCE KOENIGSBERGER, AN INTRODUCTION TO THE FEDERAL RULES OF CIVIL PROCEDURE (1938).

73. Weinstein, supra note 72, at 1910; KOENIGSBERGER, supra note 72, at 2. The Enabling Act authorized the Supreme Court to unite the general rules of cases in equity with those in actions at law. Exercising this option, the Court abolished the distinction between the two sets of rules. Federal Rule of Civil Procedure 2

reflects the abolition, providing that there shall be one form of action known as a "civil action." Id.

74. Weinstein, supra note 72, at 1910. Similarly, the drafters of the Rules sought uniformity and simplicity in order to achieve "smooth substance-oriented litigation." Id. at 1911.

75. Geoffrey C. Hazard, Jr., Discovery Vices And Trans-Substantive Virtues In The Federal Rules Of Civil Procedure, 137 U. PA. L. REV. 2237, 2241 (1989); see also Stephen B. Burbank, The Transformation Of American Civil Procedure: The Example Of Rule 11, 137 U. PA. L. REV. 1925, 1943-44 (1989) (drafters expected summary judgment motions to "separate the wheat from the chaff.").

76. Carrington, supra note 20, at 2091; Maurice Rosenberg, Federal Rules Of Civil Procedure In Action: Assessing Their Impact, 137 U. PA. L. REV. 2197 (1989). Judge Charles E. Clark, Reporter of the Rules Committee, sought to ensure that summary judgment motions would be granted liberally. Michael E. Smith, Judge Charles E. Clark And The Federal Rules Of Civil Procedure, 85 YALE L. J. 914, 928 (1976).

77. Kevin L. Sink, M & M Medical Supplies v. Pleasant Valley Hospital: Has The Fourth Circuit Signaled The End Of A "New Era"?, 71 N.C. L. REV. 1913 (1993) (citing FED. R. CIV. P. 56 advisory committee's note).

78. Id. ("In its early years, summary judgment merely represented an infrequently used method for disposing of clearly frivolous or unsubstantiated lawsuits."); Hazard, supra note 75, at 2241 ("Court interpretations . . . rendered the device virtually dormant . . . until its recent revitalization by the Supreme Court."); William O. Bertelsman, Significant Developments In The Law Of Summary Judgments, 51 KY. BENCH & B. 19, 20 (Winter 1987) (federal courts had been "parsimonious" in granting and affirming summary judgments); SINCLAIR, supra note 38 § 8.14, at 436 ("confusion and, in some courts, hostility toward the use of summary judgment motions."); FRIEDENTHAL, supra note 11 § 9.1, at 435 n.16 (empirical data indicates that the number of cases dismissed on a motion for summary judgment was relatively small); see also Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatkis, 799 F.2d 218, 222 (5th Cir. 1986) ("Trial court reluctance to grant summary judgment has been increased by frequent appellate reversals.").

79. Steven A. Childress, A New Era For Summary Judgments: Recent Shifts At The Supreme Court, 116 F.R.D. 183 (1987).

80. Id. at 183 (citing Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)). The state-of-mind issue in Hutchinson involved the actual malice requirement in public-figure defamation suits. The Supreme Court opined that "proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Hutchinson, 443 U.S. at 120 n.9.

81. Childress, supra note 79, at 183; see Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970) ("slightest doubt;" reversing grant of summary judgment); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) ("slightest doubt"); Doehler Metal Furniture Co v. United States, 149 F.2d 130, 135 (2d Cir. 1945) ("litigant has a right to trial where there is the slightest doubt as to the facts . . . ."). Periodically, other courts applied a similarly strict standard. Childress, supra note 79, at 183; see also United States v. Del Monte de Puerto Rico, Inc., 586 F.2d 870, 872 (1st Cir. 1978); Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 495 (W.D. Ark. 1982) (standard followed in Eighth Circuit) (citations omitted).

82. Childress, supra note 79, at 183.

83. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 & n.5

(6th Cir. 1989) (citations omitted); TRW Financial Sys., Inc. v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) ("ushered in a 'new era'"); Security Serv. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("well recognized that these cases brought about a 'new era' in summary judgment practice."); Sheldon Co. Profit Sharing Plan And Trust v. Smith, 828 F. Supp. 1262, 1269 (W.D. Mich. 1993) ("the federal courts have entered a 'new era' in summary judgment practice."); see also Childress, supra note 79, at 194 ("signals a new era for summary judgments").

84. Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court's Shimmering View Of Summary Judgment, Directed Verdict, And The Adjudication Process, 49 OHIO ST. L. J. 95, 99 (1988) ("effected major changes in summary judgment doctrine and practice."); see also Security Sys. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("three decisions which gave new life to Rule 56 as a mechanism for weeding out certain claims at the summary judgment.").

85. 475 U.S. 574 (1986).

86. 477 U.S. 325 (1986).

87. 477 U.S. 242 (1986).

88. Friedenthal, supra note 21, at 771 & n.12; see also Douglas A. Blaze, Presumed Frivolous: Application Of Stringent Pleading

Requirements In Civil Rights Litigation, 31 WM. & MARY L. REV. 935, 980 (1990) ("the Supreme Court recently has demonstrated significant enthusiasm for increasing the role of summary judgment in the litigation process."); Carrington, supra note 20, at 2093 ("revived summary judgment as a tool for dealing with the problem of unfounded contentions."); Bertelsman, supra, note 78, at 19 ("should greatly encourage the use of summary judgments as an effective device to dispose of unmeritorious litigation."); Childress, supra note 79, at 194 ("recent Supreme Court cases likely require that summary judgment be more readily granted, and at the least they encourage it in certain circumstances."); cf. Weinstein, supra note 72, at 1914 ("Supreme Court's recent trilogy of cases . . . will add to the difficulties plaintiffs face in getting to trial. The decisions essentially allow a defendant to require the plaintiff quickly to assemble and present its case at great expense in order to survive a motion for summary judgment.").

89. Carrington, supra note 20, at 2093 (citing Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987)).

90. 475 U.S. 574 (1986).

91. Id. at 577-78.

92. Id. at 580-81.

93. Id.

94. Id. at 578-79.

95. Id. at 580-81.

96. 471 U.S. 1002 (1985).

97. 475 U.S. at 585.

98. Id. at 587 (emphasis in original).

99. Id. at 586.

100. Id. at 587. This comment illustrates that the Supreme Court views summary judgment as a pretrial analogue to a motion for a directed verdict. John V. Jansonius, The Role of Summary Judgment in Employment Discrimination Litigation, 4 LAB. LAW. 747, 764 (1988).

101. 475 U.S. at 598.

102. Jansonius, supra note 100, at 764-65; see also Stempel, supra note 84, at 111 ("The majority did . . . signal a changed perspective on the degree to which rule 56 permits a court to eliminate a claim because of the judge's view of human motivation.").

103. 475 U.S. at 587.

104. Jansonius, supra note 100, at 765 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986)).

105. 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

106. 475 U.S. at 588. One legal commentator has opined that the Court may have replaced "the usual rule that a plaintiff is entitled to have all reasonable inferences drawn in her favor with a much stricter standard -- one which looks, not at the outer limits of plausibility, but rather at the point of equipoise between the two competing hypotheses." Daniel P. Collins, Summary Judgment and Circumstantial Evidence, 40 STAN. L. REV. 491, 497-98 (1988). However, this commentator criticized such a broad reading of the Court's opinion because it directly contradicts the traditional summary judgment rule that once the judge determines the inference to be reasonable, he may not choose among or weigh the alternatives, and is inconsistent with prior Supreme Court precedent. Id. at 501-502.

107. 475 U.S. at 588; cf. Jansonius, supra note 100, at 765 (the Court confirmed the district court's authority to evaluate competing inferences from the evidence). Summary judgment should be denied only when a reasonable jury could choose between inferences. Arguably, when there are two equally plausible inferences, no inference at all exists and summary judgment should be granted to the party that does not bear the burden of

proof at trial. Friedenthal, supra note 21, at 785-86. This argument is consistent with the language in Matsushita in which the Court stated that if the parties' explanations were equally plausible no inference of conspiracy could be drawn. Id.

108. 477 U.S. 317, 319 (1986).

109. 477 U.S. at 319.

110. Id. (emphasis in original).

111. 474 U.S. 944 (1985).

112. 477 U.S. 317 (1986).

113. Id. at 323.

114. Id. ("we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.") (emphasis in original).

115. Id.

116. Id. at 325.

117. Bertelsman, supra note 78, at 20; see also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989) ("put up or shut up").

118. 477 U.S. at 324.

119. Bertelsman, supra note 78, at 20; Street, 886 F.2d at 1478.

120. 477 U.S. at 324 ("opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . . .").

121. Stempel, supra note 84 at 106; Friedenthal, supra note 21, at 777 ("at least eight").

122. 477 U.S. at 328 (White, J., concurring).

123. Stempel, supra note 84, at 106.

124. 477 U.S. at 339 (Stevens, J., dissenting).

125. 477 U.S. 242 (1986).

126. Collins, supra note 106, at 492-93.

127. 477 U.S. at 244-45.

128. Id. (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

129. Bertelsman, supra note 78, at 19.

130. 477 U.S. at 246. The defendants submitted the affidavit of Charles Bermant, author of two of the contested articles. In his affidavit, Bermant described his efforts researching and writing the articles, and stated that he still believed the factual accuracy of his articles. Id. at 245. The remaining article,

written by Anderson, was based on information obtained exclusively from Bermant. Id. at 245 n.2.

131. 477 U.S. at 247.

132. Id. (citing Liberty Lobby, Inc., v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984)).

133. Id. (citing Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1577 (D.C. Cir. 1984)).

134. Id.

135. Id. at 248 (emphasis in original).

136. Id. at 247-48.

137. Id.

138. Id.

139. Id.

140. Id. at 248-50, 256-57.

141. 477 U.S. at 249-50. Under prior precedent, district court judges denied summary judgment when colorable evidence existed or probity had to be evaluated. Childress, supra note 79, at 190.

142. 477 U.S. at 252.

143. Id. at 250.

144. Id.

145. D. Michael Risinger, Another Step In The Counter-Revolution: A Summary Judgment On The Supreme Court's New Approach To Summary Judgment, 54 BROOK. L. REV. 35, 37 (1988). Like a normal directed verdict motion, the trial judge must "struggle with the difficulties and indeterminacies represented by the sufficiency of the evidence test." Id. at 37-38. That test states ""could a reasonable jury find to the appropriate standard of proof the facts upon which the [party] bears the burden of producing evidence . . . .'" Id. at 38 n.17; see also Collins, supra note 106, at 491 ("standard mirrors that applied in deciding a motion for a directed verdict, namely 'whether the evidence presents a sufficient disagreement to require submission to a jury.'").

146. 477 U.S. at 254.

147. Id.

148. Id. at 253-55; see also Bertelsman, supra note 78, at 19.

149. 477 U.S. at 255-56.

150. Id. at 257.

151. Childress, supra note 79, at 190.

152. Collins, supra note 106, at 514.

153. Stempel, supra note 84, at 100.

154. Id.

155. Id. at 106.

156. Id. at 107; cf. James V. Chin, Clark v. Coats & Clark, Inc.: The Eleventh Circuit Clarifies The Initial Burden In A Motion For Summary Judgment 26 GA. L. REV. 1009 (1992) ("As a result of Celotex, summary judgment was more readily available than before.").

157. Celotex Corp. v. Catrett, 477 U.S. 321, 327 (1986).

158. Id.

159. Id. at 325-26 (emphasis in original).

160. Stempel, supra note 84, at 99; Lawrence W. Pierce, Summary Judgment: A Favored Means Of Summarily Resolving Disputes, 53 BROOK. L. REV. 279, 286 (1987) ("encourage broader use of summary judgment"); Childress, supra note 79, at 193 ("signal by the Court that pretrial practice must become more liberal -- that trial courts should not be reluctant to grant summary judgments where appropriate."); see also Sheldon Co. Profit Sharing Plan And Trust v. Smith, 828 F. Supp. 1262, 1269 (W.D. Mich. 1993) ("In recent years, the Supreme Court has encouraged the use of

summary judgment where appropriate to ensure just, speedy, and efficient determinations in each case.").

161. Stempel, supra note 84, at 99.

162. Celotex, 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."); see Harris v. Roberts, 817 F. Supp. 895 (D. Kan. 1993) (interpret Rule 56 in such a way as to permit the court to isolate and dispose of factually unsupported claims or defenses); Stempel, supra note 84, at 107 (The Court's message has been: "'If trial courts start aggressively granting summary judgment, we are reluctant to second-guess them as might less-enlightened circuit panels.'").

163. See Childress, supra note 79, at 191 ("favors parties bringing a summary judgment motion."); Risinger, supra note 145, at 39 ("grossly favoring defendants over plaintiffs no matter which party is the movant."); Friedenthal, supra note 21, at 779 ("from a strictly theoretical point of view a party who moves for summary judgment, unless he or she must bear the burden of proof at trial, should need to do no more than demand that the opposing party establish that it can meet its burden of production if the case is permitted to go to trial."); see also TRW Financial Sys.,

Inc., v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) ("lowered the movant's burden on a summary judgment motion.").

164. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

165. Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting); Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Anderson v. Radison Hotel Corp., 834 F. Supp. 1364, 1367 (S.D. Ga. 1993); Barefoot v. Mid-America Dairymen, Inc., 826 F. Supp. 1046, 1048 (N.D. Tex. 1993).

166. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Lavespere, 910 F.2d at 178; Clark v. Sears, Roebuck & Co., 827 F. Supp. 1216, 1218 (E.D. Pa. 1993); see also York Excavating Co. v. Employers Insur. of Wausau, 834 F. Supp. 733, 738 (M.D. Pa. 1993) ("moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact."); Ross v. Jolly, 151 F.R.D. 562, 566 (E.D. Pa. 1993) (always bears the initial responsibility). If the moving party satisfies this burden , the burden of production then shifts to the nonmoving party; however, the ultimate burden of persuasion remains with the moving party. Gary T. Foremaster, The Movant's Burden In A Motion For Summary Judgment, 1987 UTAH L. REV. 731, 735.

167. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc); Anderson, 834 F. Supp. at 1367; see also Foremaster, supra note 166, at 736.

168. Lavespere, 910 F.2d at 178; see Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 190 (5th Cir. 1991); see also Chin, supra note 156, at 1017 (view that moving party, who bears the burden of proof at trial, must negate an essential element of the nonmoving party's claim remains valid).

169. Lavespere, 910 F.2d at 178; see also Elkins v. Richardson-Merrill, Inc., 8 F.3d 1068, 1071 (6th Cir. 1993); Duplantis, 948 F.2d at 190; Humphreys v. General Motors Corp., 839 F. Supp. 822, 825 (N.D. Fla. 1993); Anderson, 834 F. Supp. at 1367; Hebein v. Ireco, Inc., 827 F. Supp. 1326, 1329 (W.D. Mich. 1993); Accent Designs, Inc. v. Jan Jewelry Designs, Inc., 827 F. Supp. 957, 964 (S.D.N.Y. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992); Chin, supra note 156, at 1017 ("if the non-moving party has the burden of proof on an issue at trial, the moving party can satisfy its initial burden by showing the absence of evidence to support the non-moving party's case."). The moving party is not required to negate an element of the nonmovant's claim. Duplantis, 948 F.2d at 190.

170. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

171. Sink, supra note 77, at 1923 n.92; see also Duplantis, 948

F.2d at 190 (simply filing a motion is not enough); Russ v. Int'l Paper Co., 943 F.2d 589, 591 (5th Cir. 1991), cert. denied, 112 S.Ct. 1675 (1992) (same); United States v. Four Parcels Of Real Property, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) ("never enough simply to state that the non-moving party cannot meet its burden at trial . . .the moving party must point to specific portions of the record . . . ."); Anderson, 834 F. Supp. at 1367 ("merely stating that the non-moving party cannot meet its burden at trial is not sufficient.") (emphasis in original).

172. Celotex, 477 U.S. at 323.

173. Id. at 328 (White, J., concurring).

174. Id.

175. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (citation omitted).

176. Anderson v. Radisson Hotel Corp., 834 F. Supp. 1364, 1367 (S.D. Ga. 1993); see also Russ v. Int'l Paper Co., 943 F.2d 589, 591 (5th Cir. 1991), cert. denied, 112 S.Ct. 1675 (1992) ("the party opposing a motion for summary judgment must respond only after the moving party meets its initial burden."); Chevalier v. Animal Rehabilitation Ctr., Inc., 839 F. Supp. 1224, 1231 (N.D. Tex. 1993) ("The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence."); Foremaster, supra note 166, at 749 ("The

party opposing summary judgment need not respond unless and until the movant has satisfied the burden imposed on him by Rule 56(c).").

177. SINCLAIR, supra note 38 § 8.14, at 437 ("the quantum of evidence that a nonmoving party must produce in order to avoid an adverse judgment will vary in accordance with the magnitude of the evidentiary standard of proof that will apply at the trial on the merits.").

178. Nebraska v. Wyoming, 113 S.Ct. 1689, 1694 (1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)); see also Marrero Garcia v. Irizarry, 829 F. Supp. 523, 527 (D. P.R. 1993) ("must present definite, competent evidence to rebut the motion.").

179. Reich v. Conagra, Inc., 987 F.2d 1357, 1359 (8th Cir. 1993) (emphasis added); see also Clark v. Sears, Roebuck & Co., 827 F. Supp. 1216, 1218 (E.D. Pa. 1993).

180. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Resolution Trust Corp. v. Holmes, 839 F. Supp. 449, 451 (S.D. Tex. 1993); Heredia v. Johnson, 827 F. Supp. 1522, 1524 (D. Nev. 1993).

181. Christenson v. Saint Mary's Hosp., 835 F. Supp. 498, 501 (D. Minn. 1993); Michigan State Podiatry Ass'n. v. Blue Cross And

Blue Shield Of Michigan, 681 F. Supp. 1239, 1241 (E.D. Mich. 1987).

182. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

183. United States v. Four Parcels Of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc) (citations omitted).

184. Isquith v. Middle S. Util., Inc., 847 F.2d 186, 198-99 (5th Cir.), cert. denied, 488 U.S. 926 (1988); see also Foremaster, supra note 166, at 749 ("draw the court's attention to relevant evidence in the record that the movant may have overlooked or disregarded."); accord Celotex Corp. v. Catrett, 477 U.S. 329, 332 (1986) (Brennan J., dissenting) ("calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party.").

185. Isquith, 847 F.2d at 198-99 (citing Celotex Corp. v. Catrett, 477 U.S. 329, 334 (1986)).

186. Krim v. Branctexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir. 1993) (citing Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991)).

187. Krim, 989 F.2d at 1445.

188. Eastman Kodak Co. v. Image Technical Serv., 112 S.Ct. 2072, 2083 (1992).

189. Maryland Comm. Against The Gun Ban v. Simms, 835 F. Supp. 854, 860 (D. Md. 1993); cf. M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1992) (inferences must be reasonable in light of competing inferences); Pehr v. University of Chicago, 799 F. Supp. 862, 864 n.1 (N.D. Ill. 1992) (only required to draw "reasonable" inferences in nonmovant's favor).

190. Childress, supra note 79, at 192; see also Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) ("'trial court has at least some discretion to determine whether the respondent's claim is implausible.'") (citation omitted); TRW Financial Sys., Inc. v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) (same).

191. FDIC v. F.S.S.S., 829 F. Supp. 317, 321 (D. Alaska 1993); see also Knight v. Sharif, 875 F.2d 516, 523 (5th Cir. 1989); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987); Courtaulds Aerospace, Inc. v. Huffman, 826 F. Supp. 345, 349 (E.D. Cal. 1993) ("The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment."); Somavia v. Las Vegas Metro. Police Dep't, 816 F. Supp. 638, 640 (D. Nev. 1993); Mossman v. Transamerica Ins. Co., 816 F. Supp. 633, 635 (D. Hi. 1993); Jacobson v. Cohen, 151 F.R.D. 526, 528 (S.D.N.Y. 1993).

192. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); Baker v. Detroit Riverview Hosp., 834 F. Supp. 216, 219 (E.D. Mich. 1993); Independent Drug Wholesalers Group, Inc. v. Denton, 833 F. Supp. 1507, 1514 (D. Kan. 1993); Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 920 (S.D. Ohio 1993).

193. William W. Schwarzer Et. Al., The Analysis And Decision Of Summary Judgment Motions, 139 F.R.D. 441, 479 (1991).

194. Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986); M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1992); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3rd Cir. 1988); National Acceptance Co. Of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1316 (E.D. Wis. 1993); Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 920 (S.D. Ohio 1993); Standard Fire Ins. Co. v. Rominger, 827 F. Supp. 1277, 1278 (S.D. Tex. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992).

195. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

196. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."); Bridge

Publications, Inc. v. Vien, 827 F. Supp. 629, 631 (S.D. Cal. 1993). However, if the inconsistency was the result of confusion, an honest discrepancy, a mistake, or the result of newly discovered evidence, the affidavit may create a genuine issue of fact. Kennedy, 952 F.2d at 266-67 (discussing case law in other circuits); see also Unterreiner v. Volkswagen Of America, Inc., 8 F.3d 1206, 1210 (7th Cir. 1993) ("'party may not create a genuine issue of fact by contradicting his own earlier statements, at least without a plausible explanation for the sudden change of heart.'") (emphasis in original; citation omitted); Schwarzer, supra note 190, at 480 ("A party normally will not be able to defeat summary judgment with an affidavit that directly contradicts that party's earlier affidavit or sworn testimony, unless the affidavit is accompanied by a credible explanation for the contradiction.").

197. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990) (nonmovant may not "replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Travelers Ins. Co. v. Liljeberg Enter., Inc., 7 F.3d 1203, 1207 (5th Cir. 1993); Allstate Ins. Co. v. Barnett, 816 F. Supp. 492, 495 (S.D. Ind. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992). This principle remains true even if the movant "cannot demonstrate contrary facts by specific affidavit recitation to rebut the conclusory affidavit." Travelers Ins. Co., 7 F.3d at 1207.

198. L.S.T., Inc. v. Crow, 834 F. Supp. 1355, 1361 (M.D. Fla. 1993); see also Nieves v. University of Puerto Rico, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factual assertions by counsel in motion papers, memoranda, briefs, or other such 'self-serving' documents, are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."); British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979) (legal memoranda and oral argument insufficient); Lamontagne v. E. I. Du Pont De Nemours And Co., 834 F. Supp. 576, 580 (D. Conn. 1993) (mere conclusionary allegations or denials in legal memoranda and oral argument are not evidence); Mossman v. Transamerica Ins. Co., 816 F. Supp. 633, 635 (D. Hi. 1993) ("legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment."); cf. Osborn v. Bell Helicopter Textron, Inc., 828 F. Supp. 446, 448 (N.D. Tex. 1993) ("must produce evidence, not merely argument . . . .").

199. Schwarzer, supra note 193, at 479.

200. Carroll Touch, Inc. v. Electro Mechanical Sys., Inc., 3 F.3d 404, 413 (Fed. Cir. 1993).

201. SINCLAIR, supra note 38 § 8.14, at 437; see also Carroll Touch, Inc., 3 F.3d at 413; Hebein v. Ireco, Inc., 827 F. Supp. 1326, 1329 (W.D. Mich. 1993).

202. Custer v. Pan American Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993); Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993) (admits that no material issue of fact exists); Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988) (treat facts as undisputed); Corretjer Farinacci v. Picayo, 149 F.R.D. 435, 438 (D.P.R. 1993); Lovejoy v. Saldanha, 838 F. Supp. 1120, 1121 n. 1 (S.D. W.Va. 1993) (accepts factual allegations as undisputed); Mills v. United States, 805 F. Supp. 448, 449 (E.D. Tex. 1992); cf. General Electric Capital Corp. v. Kozil, 149 F.R.D. 149, 153 (N.D. Ill. 1993) (based on local rule, all material facts deemed admitted); Saini v. Bloomsburg Univ. Faculty, 826 F. Supp. 882, 886 (M.D. Pa. 1993) (same).

203. Schwarzer, supra note 193, at 480; see also Custer, 12 F.3d at 416 ("moving party must still show that the uncontroverted facts entitle the party to 'a judgment as a matter of law.'") (citation omitted); Glass, 2 F.3d at 739; Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993) (cannot award summary judgment as a sanction for failure to oppose a motion for summary judgment); Corretjer Farinacci, 149 F.R.D. at 438; Mills, 805 F. Supp. at 449. But cf. Kelson v. Southern Bell Telephone & Telegraph Co., 778 F. Supp. 521, 523 (S.D. Fla. 1991) ("well within this Court's discretion to grant the summary judgment motion based on the fact that it was unopposed . . . ."). The district court may dismiss the case for failure to prosecute. Tobey, 985 F.2d at 332.

204. Schwarzer, supra note 193, at 480; see also Picayo, 149 F.R.D. at 438. Some jurisdictions require the court to review the entire record for evidence of a genuine dispute. Schwarzer, supra note 193, at 480; see also Glass, 2 F.3d at 739 ("under an obligation to look at the entire record . . . ."); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930 (1st Cir. 1983); Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980). However, these same jurisdictions have suggested that in a large and complex case, the district court need not read the entire record before deciding a motion for summary judgment. Glass, 2 F.3d at 739 n.4 ("does not mean that the court must examine the entire record where the case is large and complex, become a 'ferret,' or otherwise look for a 'needle in a paper haystack.'") (citation omitted); Stepanischen, 722 F.2d at 930 n.2; Higgenbotham v. Ochsner Found. Hosp., 607 F.2d 653, 656-67 (5th Cir. 1979) (need not look for a "needle in a paper haystack.")

205. Picayo, 149 F.R.D. at 438 (citing Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 929 (1st Cir. 1983)); Thornton v. Evans, 692 F.2d 1064, 1075 (7th Cir. 1982)).

206. See Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) ("proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition."); Foster v. Arcata Assoc., Inc., 772 F.2d 1453,

1459 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986); Meagher v. Lamb-Weston, 839 F. Supp. 1403, 1413 (D. Or. 1993) (courts are generally cautious about granting summary judgment when motivation and intent are at issue).

207. 368 U.S. 464 (1962).

208. Id. at 473 (emphasis added); see also Jansonius, supra note 100, at 756.

209. 10A WRIGHT, supra note 11 § 2730, at 248-55 (citations omitted).

210. Prior to 1986, summary judgment was rarely successful in Title VII and ADEA cases. Jansonius, supra note 100, at 756-57. A survey of published decisions between 1979 and 1985 revealed that circuit courts reversed grants of summary judgment in 59 of 96 decisions, and district court opinions reflected the denial of such motions in 121 out of 180 attempts. Id. at 759; see also Thornbrough v. Columbus And Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985) ("summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent.").

211. See also Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 921 (11th Cir. 1993) ("the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the

plaintiff has established a prima facie case because of the 'elusive factual question' of intentional discrimination.'"; (citation omitted); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993) (summary judgment "standard is applied with additional rigor in employment discrimination cases, where intent and credibility are crucial issues."); Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 364 (8th Cir. 1987) (summary judgments used sparingly in employment discrimination cases); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1390 (N.D. Ill. 1993) (applied with added vigor). Since 1986, the circuit courts have split on this issue. Jansonius, supra note 100, at 771 ("some circuits see a broader role for Rule 56 in employment discrimination litigation and others do not."). The Second, Third, Eighth, Ninth and Eleventh Circuits have exhibited a reluctance to grant summary judgment in employment discrimination cases. Id. at 777.

212. Krim v. Banctexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993) (securities fraud); Rhodes v. Ford Motor Credit Co., 951 F.2d 905, 906-907 (8th Cir. 1991) (defamation); Illinois Bell Telephone Co. v. Haines And Co., 905 F.2d 1081, 1087 (7th Cir. 1990) (antitrust case); LeFevre v. Space Communications Co. (SPACECOM), 771 F.2d 421, 423 (10th Cir. 1985) (intentional interference with employment contract); Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) (insurance entitlement); American Telephone & Telegraph Co. v. New York City Human

Resources Administration, 833 F. Supp. 962, 974 (S.D.N.Y. 1993) (telecommunications). But cf. Coolspring Stone Supply v. American States Ins. Co., 10 F.3d 144, 148 (3rd Cir. 1993) (inappropriate in cases involving state of mind determinations); Christiania General Ins. v. Great American Ins., 979 F.2d 268, 274 (2d Cir. 1992) ("though the construction of a contract is a matter of law, when resort to extrinsic evidence is necessary to shed light on the parties intent summary judgment ordinarily is not an appropriate remedy . . . ."); Wanke v. Lynn's Transp. Co., 836 F. Supp. 587, 600 (N.D. Ill. 1993) ("must be circumspect in approaching summary judgment motions that turn on a party's state of mind . . . ."); Orange Lake Assoc., Inc. v. Kirkpatrick, 825 F. Supp. 1169, 1173 (S.D.N.Y. 1993) ("where a defendant's intent and state of mind are implicated, summary judgment is ordinarily inappropriate.").

213. See Goldman v. First Nat'l Bank Of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (age discrimination: "'[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'") (citation omitted); Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993) (discrimination based on Italian origin); Morgan v. Harris Trust And Sav. Bank of Chicago, 867 F.2d 1023, 1026 (7th Cir. 1989) (Title VII: "Summary judgment will not be defeated simply because issues of motive or intent

are involved . . . ."); Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988) (sex discrimination: "'even when such issues of motive and intent are at stake, summary judgment is proper where the plaintiff presents no indication of motive or intent supportive of his position.'") (citation omitted); Solt v. Alpo Petfoods, Inc., 837 F. Supp. 681, 683-84 (E.D. Pa. 1993) ("Although allegations of discrimination which involve an analysis of motive or intent are fact intensive, summary judgment is appropriate where plaintiff has not provided enough evidence to support a reasonable inference of discrimination."); Moore v. Nutrasweet Co., 836 F. Supp. 1387 (N.D. Ill. 1993) (granting summary judgment in Title VII case); Samuelson v. Durkee/French/Airwick, 760 F. Supp. 729, 734-35 (N.D. Ind. 1991) (age and sex discrimination) ("Even on the issue of intent, summary judgment is proper if the party with the burden at trial presents no indication of the necessary motive or intent."); cf. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) ("The workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led courts to take a critical look at efforts to withstand defendants' motions for summary judgment.").

214. 10A WRIGHT, supra note 11 § 2730, at 262-65 (citations omitted).

215. Sink, supra note 77, at 1925 ("viability of summary judgment with respect to . . .'state of mind' cases cannot be questioned."); see also TRW Financial Sys., Inc. v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) (After the Supreme Court trilogy, the Sixth Circuit has taken the position that cases involving state of mind issues may be appropriate for summary judgment); cf. Jansonius, supra note 100, at 747-48 ("Reluctance to award summary judgment [in employment discrimination cases] when pre-trial discovery fails to reveal evidence of discriminatory intent is no longer warranted.").

216. David A. Sonenshein, State Of Mind And Credibility In The Summary Judgment Context: A Better Approach, 70 NW. U. L. REV. 774, 786-87 (1983). The original drafters of the Rules declined to exclude particular issues of fact from the summary judgment process despite state models that singled out state of mind issues as being inappropriate for summary judgment. Id. at 787 n.49.

217. Jansonius, supra note 100, at 770.

218. Sink, supra note 77, at 1923.

219. Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988).

220. Beard, 840 F.2d at 410. See also 10A WRIGHT, supra note 11 § 2730, at 58 (Supp. 1993).

221. 42 U.S.C. § 2000e (1988).

222. 411 U.S. 792 (1973). This burden shifting framework is also applicable to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1988). Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314 (4th Cir. 1993); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 565 n.11 (5th Cir. 1982), cert. denied, 467 U.S. 1215 (1984); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Howell v. Levi Strauss & Co., 840 F. Supp. 132, 134 (M.D. Ga. 1994); Reiff v. Philadelphia County Court Of Common Pleas, 827 F. Supp. 319, 324 (E.D. Pa. 1993).

223. 411 U.S. at 802; Saint Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993).

224. Jansonius, supra note 100, at 750.

225. Hicks, 113 S.Ct. at 2747 (citations omitted); Lenoir v. Roll Coasters, Inc., 13 F.3d 1130, 1132 (7th Cir. 1994) (raises an inference of discrimination).

226. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248,

254 (1981) (citing Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

227. Hicks, 113 S.Ct. at 2747; Lenoir, 13 F.3d at 1133 (articulate a legitimate, nondiscriminatory reason).

228. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

229. Jansonius, supra note 100, at 750 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

230. Burdine, 450 U.S. at 254 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons."); see also Jansonius, supra note 100, at 750.

231. Burdine, 450 U.S. at 254-55.

232. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Lenoir, 13 F.3d at 1133 (focus on the specific reasons advanced by the defendant); McDonald v. Union Camp Corp., 898 F.2d 1153, 1160 (6th Cir. 1990).

233. Hicks, 113 S.Ct. at 2752; Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1395 (N.D. Ill. 1993).

234. Hicks, 113 S.Ct. at 2747; Wilkins v. Eaton Corp., 790 F.2d 515, 520 (6th Cir. 1986); Baker v. Emery Worldwide, 789 F. Supp. 678, 681 (W.D. Pa. 1991).

235. Anderson v. Liberty Lobby, 477 U.S. 242, 254 (1986); see also Reed v. Amax Coal Co., 971 F.2d 1295, 1297 (7th Cir. 1992) ("'must consider both the substantive law of employment discrimination and the burden of proof under applicable law.'") (citation omitted); Collins v. Kahelski, 828 F. Supp. 614, 618 (E.D. Wisc. 1993) ("must also analyze summary judgment motions within the context of the legal standards governing the specific claims at issue . . . .").

236. Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1459 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986).

237. Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991). Additionally, the defendant may offer its legitimate reason for the challenged personnel action at this point and force the plaintiff to establish both a prima facie case and prove that the defendant's reasons are a pretext for discrimination. Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

238. Burton v. Great W. Steel Co., 833 F. Supp. 1266, 1276 (N.D. Ill. 1993); see also Mitchell, 12 F.3d at 1315 ("in response to a defendant's motion for summary judgment, the plaintiff must present admissible evidence to establish a prima facie case."); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) ("burden on summary judgment of a plaintiff asserting disparate treatment under Title VII is thus to establish a prima facie case

of discrimination . . . ."); Howell v. Levi Strauss & Co., 840 F. Supp. 132, 136 (M.D. Ga. 1993); LaPointe v. United Auto Workers Local 600, 782 F. Supp. 347, 349 (E.D. Mich. 1992) (if plaintiff fails to establish a prima facie case his "claim fails as a matter of law."); cf. Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1459 (9th Cir. 1985) (a plaintiff is not required to prove a prima facie case by a preponderance of the evidence; rather, it is only required to produce evidence sufficient to support a reasonable inference of discrimination), cert. denied, 475 U.S. 1048 (1986); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1395 (N.D. Ill. 1993) (need only establish a triable factual issue). However, "the establishment of a prima facie case does not in itself entitle an employment discrimination plaintiff to survive a motion for summary judgment in all cases." Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987); see also Jansonius, supra note 100, at 780 ("The majority view holds that summary judgment may be awarded despite presentation of evidence sufficient to state a prima facie case.").

239. Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1390 (6th Cir. 1993).

240. Barnhart, 12 F.3d at 1389; Mitchell, 12 F.3d at 1315; Washington, 10 F.3d at 1433; Hankins v. Temple Univ., 829 F.2d 437, 441 (3rd Cir. 1987); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983) ("must tender a genuine issue of material

fact as to pretext in order to avoid summary judgment."); Reiff v. Philadelphia County Court Of Common Pleas, 827 F. Supp. 319, 324-25 (E.D. Pa. 1993).

241. Washington, 10 F.3d at 1433. The plaintiff does not have to satisfy its trial burden by proving that the defendant's proffered reason is a pretext for discrimination; it must only create a genuine issue of fact on that issue that, if ultimately resolved in its favor, would meet its burden of persuasion at trial; cf. Weldon v. Kraft, Inc., 896 F.2d 793, 797 (3rd Cir. 1990); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1395 (N.D. Ill. 1993).

242. Lenoir v. Roll Coasters, Inc., 13 F.3d 1130, 1133 (7th Cir. 1994); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596-97 (11th Cir. 1987).

243. Foremaster, supra note 166, at 736.

244. Id.

245. See Reed v. Amax Coal Co., 971 F.2d 1295, 1299-1300 (7th Cir. 1992) (summary judgment entered against moving party plaintiff who failed to establish a prima facie case of discrimination and failed to establish that the defendant's articulated reasons for the challenged personnel action were a pretext for discrimination).

246. Foremaster, supra note 166, at 736 (citing United States v. General Motors, 518 F.2d 420, 442 (D.C. Cir. 1975)).

247. Lang v. Retirement Living Publishing Co., Inc., 949 F.2d 576, 580 (2d Cir. 1991) (affirming summary judgment despite argument that summary judgment is inappropriate given the factual complexity of the case); Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) ("complex cases not necessarily inappropriate for summary judgment); In re Silicone Gel Breast Implants Prod. Liab. Litig., 837 F. Supp. 1128, 1132 (N.D. Ala. 1993) ("even litigation involving complex fact-intensive issues, such as in many antitrust cases, may be appropriately resolved through summary disposition . . . ."); Clorox Co. v. Winthrop, 838 F. Supp. 983, 988 (E.D.N.Y. 1993) (summary judgment remains a vital procedural tool in complex antitrust cases); Girl Scouts v. Bantam Doubleday Dell Pub., 808 F. Supp. 1112, 1118 (S.D.N.Y. 1992) ("Neither the volume of evidence nor the complexity of the case should preclude a grant of summary judgment if otherwise appropriate."); see also SINCLAIR, supra note 38 § 8.14, at 438 ("not necessarily precluded merely because the facts or the legal issues are complex."); Sink, supra note 77, at 1925 (viability of summary judgment in complex cases cannot be questioned).

248. SINCLAIR, supra note 38 § 8.14, at 438.

249. 10A WRIGHT, supra note 11 § 2732, at 304 (citations omitted).

250. Id.

251. Id.; see also Amerinet, Inc. v. Xerox Corp. 972 F.2d 1483, 1490 (8th Cir. 1992) ("In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies.").

252. 10A WRIGHT, supra note 11 § 2732, at 304 (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948); Eccles v. Peoples Bank of Lakewood Village, California, 333 U.S. 426 (1948); Arenas v. United States, 322 U.S. 419, 434 (1944)). Fortunately, the majority of lower courts that a complex factual situation did not necessarily bar summary judgment. Id. at 306.

253. 322 U.S. 419 (1944).

254. Id. at 420. The suit was brought pursuant to the Mission Indian Act of 1891, 26 Stat. 712, which allotted reservation land to individual Native Americans.

255. Arenas, 322 U.S. at 434.

256. Matsushita, 475 U.S. at 577; Sink, supra note 77, at 1924.

257. See also Bertelsman, supra note 78, at 20 ("holding that summary judgment was proper even in a complex antitrust case.").

258. FED. R. CIV. P. 56(e).

259. Fireman's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1310 (8th Cir. 1993) ("district court must base its determination regarding the presence or absence of a material factual dispute on evidence that will be admissible at trial."); Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 191 (5th Cir. 1991) ("long been settled law that a plaintiff must respond to an adequate motion for summary judgment with admissible evidence."); In re New America High Income Fund Sec. Litig., 834 F. Supp. 501, 506 (D. Mass. 1993) ("evidence must be introduced by affidavit, and it must be in admissible form."); Standard Fire Ins. Co. v. Rominger, 827 F. Supp. 1277, 1278 (S.D. Tex 1993) ("must produce evidence admissible at trial."); Gonzales v. North Township Of Lake County, 800 F. Supp. 676, 680 (N.D. Ind. 1992); Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990) ("a district court may consider only admissible evidence in ruling on a summary judgment motion.").

260. Schwarzer, supra note 193, at 481; see also Contini v. Hyundai Motor Co., 840 F. Supp. 22, 25 n.2 (S.D.N.Y. 1993) (need not be in admissible form). Presumably, the moving party, who submits affidavits or other evidence, is held to the evidentiary standards. See Thompson v. Dulaney, 838 F. Supp. 1535, 1539 (D. Utah 1993) ("movant satisfies its burden by producing evidence that is admissible as to content, not form . . . .").

261. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

262. Id.

263. Id.

264. FED. R. CIV. P. 56(c). Some courts permit the use of verified pleadings, i.e., those signed under oath, but only to the extent that these pleadings state specific facts and otherwise meet the requirements of proper affidavits. FRIEDENTHAL, supra note 11 § 9.2, at 437 (citations omitted). Rule 56 also permits the submission of sworn or certified copies of documents. FED. R. CIV. P. 56(e).

265. Schwarzer, supra note 193, at 481 (citing Offshore Aviation v. Transcon Lines, 831 F.2d 1013, 1015 (11th Cir. 1987)); see also Bushman v. Halm, 798 F.2d 651, 654 n.5 (3rd Cir. 1986) ("not obligated to produce rebuttal evidence which would be admissible at trial."); Cooper v. United States, 827 F. Supp. 1309, 1312 (E.D. Mich. 1993) ("evidence itself need not be the sort admissible at trial."); cf. Dow v. United Bhd. Of Carpenters And Joiners Of America, 1 F.3d 56, 58 (1st Cir. 1993) ("the required proof need not necessarily rise to the level of admissible trial evidence . . . .").

266. Schwarzer, supra note 193, at 481-82 (citations omitted); see also Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 192 (5th Cir. 1991); cf. Reed v. Amax Coal Co., 971 F.2d 1295, 1299 (7th Cir. 1992) ("A plaintiff raises adequate issues of fact when

he presents evidentiary material which, if reduced to admissible evidence, may allow him to carry his burden of proof.").

267. FED. R. CIV. P. 56 advisory committee's note (1963 Amendment); see also Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) ("summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial."); Bird v. Centennial Ins. Co., 11 F.3d 228, 231 (1st Cir. 1993) ("'assay the parties' proof in order to determine whether trial is actually required'") (citations omitted).

268. FRIEDENTHAL, supra note 11 § 9.2, at 437; see also Mitchell, 12 F.3d at 1316 (allows the court to forecast the proof at trial).

269. Specifically, the Rule states: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." FED. R. CIV. P. 56(e). The Seventh Circuit has opined that Rule 56's personal knowledge requirement parallels Federal Rule of Evidence 602, which forbids a lay person from testifying about matters to which he has no personal knowledge. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); cf. Lavespere v. Niagara Mach. & Tool Works,

Inc., 910 F.2d 167, 175-76 (5th Cir. 1990) ("As a general rule, the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial."); Courtaulds Aerospace, Inc. v. Huffman, 826 F. Supp. 345, 348 (E.D. Cal. 1993) ("Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence generally.").

270. Some courts have held Federal Rule of Civil Procedure 43(e) to be applicable to motions for summary judgment, even though Federal Rule of Civil Procedure 56 is silent on the point. FRIEDENTHAL, supra note 11 § 9.1, at 432 n.14 (citations omitted); 10A WRIGHT, supra note 11 § 2723 (citations omitted). Federal Rule of Civil Procedure 43(e) states: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." FED. R. CIV. P. 43(e).

271. FRIEDENTHAL, supra note 11 § 9.2, at 437.

272. See Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 224-25 (7th Cir. 1993); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3rd Cir. 1993) (may be considered if "it is capable of being admissible at trial."); Reed v. Amax Coal Co., 971 F.2d 1295, 1299 (7th Cir.

1992) (may consider "evidentiary material which, if reduced to admissible evidence, may allow him to carry his burden of proof.").

273. M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 164 (4th Cir. 1992), cert. denied, 113 S.Ct. 2962 (1993); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); McLendon v. Georgia Kaolin Co., Inc., 837 F. Supp. 1231, 1236 (M.D. Ga. 1993); Burton v. Great W. Steel Co., 833 F. Supp. 1266, 1269 (N.D. Ill. 1993); United States v. Valore, 152 F.R.D. 1 (D. Me. 1993); Somavia v. Las Vegas Metro. Police Dep't, 816 F. Supp. 638, 640 (D. Nev. 1993); Reed Paper Co. v. Proctor & Gamble Distrib. Co., 807 F. Supp. 840, 846 (D. Me. 1992); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992). Familiarity with the proceedings does not constitute personal knowledge. Gonzales v. North Township Of Lake County, 800 F. Supp. 676, 680 (N.D. Ill. 1992) (citing Walpert v. Bart, 280 F. Supp. 1006, 1010 (D. Md. 1967), aff'd, 390 F.2d 877 (4th Cir. 1968)). To be considered on summary judgment, deposition testimony must also be based on personal knowledge. Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990). If the error is harmless, a court's erroneous admission or exclusion of an affidavit that does not satisfy Rule 56(e)'s requirements does not require reversal of a summary judgment. Richardson v. Oldham, 12 F.3d 1373, 1378 n.13 (5th Cir. 1994). Reversal is only necessary if the erroneous admission or

exclusion of evidence caused actual prejudice. J.R. Maffei v. Northern Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993). Appellate courts will review the decision to admit or exclude the evidence under an abuse of discretion standard. Id.

274. Palucki, 879 F.2d at 1572.

275. Burton, 833 F. Supp. at 1269; see also KOENIGSBERGER, supra note 72, at 53 ("Affidavits based on information and belief will not be in compliance with the rule . . . .")..

276. Jarvis v. A & M Records, 827 F. Supp. 282, 287 (D. N.J. 1993).

277. Palucki, 879 F.2d at 1572; Burton, 833 F. Supp. at 1269.

278. Committe v. Dennis Reimer Co., 150 F.R.D. 495, 499 (D. Vt. 1993).

279. The Rule states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

280. Committe v. Dennis Reimer Co., 150 F.R.D. 495, 499 (D. Vt. 1993) (citing H. Sand & Co. v. Airtemp Corp., 934 F.2d 450, 454-55 (2d Cir. 1991)); see also Horta v. Sullivan, 4 F.3d 2, 8 (1st Cir. 1993); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3rd Cir. 1988); FDIC v. F.S.S.S., 829 F. Supp. 317, 320 n.4 (D.

Alaska 1993); Airlie Found., Inc. v. United States, 826 F. Supp. 537, 546 (D.D.C. 1993); Jaret Int'l, Inc. v. Promotion In Motion, Inc., 826 F. Supp. 69, 72-73 (E.D.N.Y. 1993); SINCLAIR, supra note 38 § 8.14, at 442. This rule also applies to the use of deposition testimony for summary judgment. Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990).

281. Fireman's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1310 (8th Cir. 1993); Naantaanbuu v. Abernathy, 816 F. Supp. 218, 228 (S.D.N.Y. 1993); Reed Paper Co. v. Procter & Gamble Distrib. Co., 807 F. Supp. 840, 846 (D. Me. 1992); Garrett v. Lujan, 799 F. Supp. 198, 200 (D.D.C. 1992); see also Kimberlain v. Quinlan, 6 F.3d 789, 797 n.15 (D.C. Cir. 1993) ("'normally' hearsay 'would not be enough to raise an issue of fact for summary judgment purposes.'") (citation omitted).

282. Moore v. Holbrook, 2 F.3d 697, 699 (6th Cir. 1993) ("documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded."); Osri v. Kirkwood, 999 F.2d 86, 90 (4th Cir. 1993) ("unsworn, unauthenticated documents cannot be considered on a motion for summary judgment."); Hal Roach Studios v. Richard Feiner and Co., 896 F.2d 1542, 1550 (9th Cir. 1990) ("well established that unauthenticated documents cannot be considered on a motion for summary judgment."); Martz v. Union Labor Life Ins. Co., 757 F.2d 135, 138 (7th Cir. 1985) ("district court

could not properly have relied upon the exhibits as submitted . . . ."); Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (attached medical records "were not certified as required by Fed. R. Civ. P. 56(e) and thus were not properly considered by the district court."); Mitchell v. Beaubouef, 581 F.2d 412, 414 (5th Cir. 1978) (error to grant summary judgment based upon unverified administrative report), cert. denied, 441 U.S. 966 (1979)

283. Hal Roach Studios, 896 F.2d at 1550-51; see also 10A WRIGHT, supra note 11 § 2722, at 58-60. A certified copy of the document and an affidavit from the records custodian would serve as sufficient authentication. Hal Roach Studios, 896 F.2d at 1551 (citing FED. R. EVID. 901).

284. 10A WRIGHT, supra note 11 § 2722, at 61; see also Moore v. Holbrook, 2 F.3d 697, 699 (6th Cir. 1993) (failure to object to unsworn and uncertified documents waives the issue); Michigan State Podiatry Assoc. v. Blue Cross And Blue Shield Of Michigan, 681 F. Supp. 1239 (E.D. Mich. 1987) ("if an objection is untimely, it is deemed waived.").

285. 10A WRIGHT, supra note 11 § 2722, at 60; see also Michigan State Podiatry Assoc., 681 F. Supp. at 1243 ("unchallenged materials may be considered by the Court.").

286. See Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994); Lacey v. Lumber Mutual Fire Ins. Co. Of Boston, 554 F.2d

1204, 1205 (1st Cir. 1977) (party may move to strike "affidavits containing evidence that would be inadmissible at trial as well as to affidavits that are defective in form."); Conde v. Velsicol Chem. Corp., 804 F. Supp. 972 (S.D. Ohio 1992); Gonzales v. North Township Of Lake County, 800 F. Supp. 676, 680 (N.D. Ind. 1992); cf. Scharf v. United States Attorney Gen., 597 F.2d 1240, 1243 (9th Cir. 1979) (formal defects in affidavits are waived absent a motion to strike or other objection). The court may strike any matter that is "redundant, immaterial, impertinent, or scandalous . . . ." FED. R. CIV. P. 12(f).

287. United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 549 (5th Cir. 1985); Donovan v. Carls Drug Co., 703 F.2d 650, 651 (2d Cir. 1983); Luick v. Graybar Elec. Co., 473 F.2d 1360, 1362 (8th Cir. 1973); Vermont v. Staco, Inc., 684 F. Supp. 822, 829 (D. Vt. 1988); Morris v. Russell, Burdsall & Ward Corp., 577 F. Supp. 147, 151 (N.D. Ohio 1983); EEOC v. Baby Prod. Co., 89 F.R.D. 129, 132 (E.D. Mich. 1981); Jackson v. Riley Stoker Corp., 57 F.R.D. 120, 122 (E.D. Pa. 1972).

288. 10A WRIGHT, supra note 11 § 2722, at 54; see also McKinley v. Afram Lines (USA) Co., 834 F. Supp. 510, 512 (D. Mass. 1993) ("not limited to admissions formally made pursuant to Rule 36 . . . .").

289. 10A WRIGHT, supra note 11 § 2722, at 54 (citations omitted).

290. McKinley, 834 F. Supp. at 513.

291. 10A WRIGHT, supra note 11 § 2722, at 54.

292. 6 F.3d 1058 (5th Cir. 1993).

293. Id. at 1064.

294. 6 F.3d 211 (4th Cir. 1993).

295. Id. at 218. When appropriate, a court may take judicial notice of facts in support of a motion for summary judgment. Aqua Queen Mfg., Inc. v. Charter Oak Fire Ins., 830 F. Supp. 536 (C.D. Cal. 1993); Gonzales v. North Township Of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992); see also SINCLAIR, supra note 35 § 8.14, at 441.

296. Schwarzer, supra note 193, at 483 (citing Washington v. Armstrong World Indus., 839 F.2d 1121, 1123-24 (5th Cir. 1988)). Although expert affidavits are generally permitted, "'courts scrutinize expert affidavits rigorously to ensure that the proffered expert input is really helpful to the trier of fact.'" 10A WRIGHT, supra note 11 § 2722, at 18 (Supp. 1993) (citation omitted).

297. Schwarzer, supra note 193, at 483 (citing Federal Rules of Evidence 402, 403, 702 and 703, respectively); see also Brady v. DiBiaggio, 794 F. Supp. 663, 673 n.13 (W.D. Mich. 1992) (qualifications not contained in the affidavit). However, a

court should not decide summary judgment based upon the relative credibility of competing expert affidavits. Smith v. Hughes Aircraft Co., 10 F.3d 1448, 1456 (9th Cir. 1993).

298. Sink, supra note 77, at 1927 (courts are split).

299. FED. R. CIV. P. 56(e). Federal Rule of Civil Procedure 56(e)'s specific facts requirement supplements the nonmoving party's burden, as articulated in Celotex, by "requiring evidence that precisely addresses the issue at hand rather than evidence exhibiting general implications concerning the relevant issue." Sink, supra note 77, at 1927 n.115.

300. FED. R. EVID. 1101(b); see also M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 165 (4th Cir. 1992), cert. denied, 113 S.Ct. 2962 (1993).

301. FED. R. EVID. 705.

302. FED. R. EVID. 703.

303. Sink, supra note 77, at 1927 (citing Slaughter v. Southern Talc Co., 919 F.2d 304, 307 n.4 (5th Cir. 1990); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985); United States v. Various Slot Mach. on Guam, 658 F.2d 697, 700 (9th Cir. 1981); Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 673 (D.C. Cir. 1977)); Schwarzer, supra note 193, at 484 (citing Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339

(7th Cir. 1989)); see also Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993); cf. Richardson v. Oldham, 12 F.3d 1373, 1379 (5th Cir. 1994) (court did not err in striking affidavit of plaintiff's expert witness because affidavit was not based on specific facts).

304. Sink, supra note 77, at 1927.

305. Id.; see also Schwarzer, supra note 193, at 484.

306. Sink, supra note 77, at 1927 (citing Ambrosini v. Labarraque, 966 F.2d 1464, 1469 (D.C. Cir. 1992); Bulthuis v. Rexall Corp., 789 F.2d 1315, 1317 (9th Cir. 1985)).

307. Id. at 1928 (citation omitted).

308. 981 F.2d 160 (4th Cir. 1992), cert. denied, 113 S.Ct. 2962 (1993).

309. M & M Medical Supplies, 981 F.2d at 165; see also Sink, supra note 77, at 1928.

310. M & M Medical Supplies, 981 F.2d at 165.

311. Sink, supra note 77, at 1928.

312. Id.

313. Id. at 1929. Otherwise, any conclusory affidavit could

defeat summary judgment simply by characterizing the lack of specific facts as a lack of underlying data. Id.

314. 8 F.3d 88 (1st Cir. 1993).

315. Hayes, 8 F.3d at 92.

316. Id.

317. Id.

318. Federal Rule of Civil Procedure 56(f) states:
When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

319. Sonenshein, supra note 216, at 785.

320. Anderson v. Liberty Lobby, Inc., 477 U.S. 255, 257 (1986).

321. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Dow v. United Bhd. Of Carpenters And Joiners Of America, 1 F.3d 56, 60 (1st Cir. 1993) (Court in Celotex recognized the requirement of adequate time for discovery).

322. Blaze, supra note 88, at 982 n.296.

323. Friedenthal, supra note 21, at 780 n.39; see National Acceptance Co. Of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1318 (E.D. Wis. 1993) (denying continuance for failure to file requisite affidavit).

324. Friedenthal, supra note 21, at 780 n.39 (citing Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusements, Inc., 824 F.2d 710 (9th Cir. 1987), cert. denied, 487 U.S. 1247 (1988); Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828 (10th Cir. 1986)); see also Humphreys v. Roche Biomedical Lab., Inc., 990 F.2d 1078, 1081 (8th Cir. 1993) (affirming grant of summary judgment). Appellate courts review a district court's denial of a Rule 56(f) motion for an abuse of discretion. Bird v. Centennial Ins. Co., 11 F.3d 228, 235 (1st Cir. 1993); Jensen v. Redevelopment Agency, 998 F.2d 1550, 1553 (10th Cir. 1993); Humphreys, 990 F.2d at 1081.

325. Emmons v. McLaughlin, 874 F.2d 351, 356 (6th Cir. 1989); Harwell v. American Medical Sys., Inc., 803 F. Supp. 1287, 1294 (M.D. Tenn. 1992).

326. Humphreys v. Roche Biomedical Lab., Inc., 990 F.2d 1078, 1081 (8th Cir. 1993) (citations omitted); see also Emmons v. McLaughlin, 874 F.2d 351, 356 (6th Cir. 1989) (not a shield).

327. Emmons, 874 F.2d at 356.

328. Federal Rule of Civil Procedure 56(f) states: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." FED. R. CIV. P. 56(f); see also DiCesare v. Stuart, 12 F.3d 973, 979 (10th Cir. 1993) ("if DiCesare felt he could not oppose defendants' motions for summary judgment without more information, he should have submitted an affidavit pursuant to Fed.R.Civ.P. 56(f) requesting a continuance until further discovery was had."); Hickman v. Wal-Mart Stores, Inc., 152 F.R.D. 216, 221 (M.D. Fla. 1993) (must file an affidavit); cf. Lorenzo v. Griffith, 12 F.3d 23, 27 n.5 (3rd Cir. 1993) ("Under accepted practice, when additional discovery is needed, a Rule 56(f) motion should be filed, explaining why opposing affidavits are unavailable.").

329. Hudson River Sloop Clearwater v. Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989); see also Ammcon, Inc. v. Kemp, 826 F. Supp. 639, 646 (E.D.N.Y. 1993); Hickman, 152 F.R.D. at 221; cf. Bird v. Centennial Ins. Co., 11 F.3d 228, 235 (1st Cir. 1993) ("required (1) to articulate a plausible basis for its belief that the requested discovery would raise a trialworthy issue, and (2) to demonstrate good cause for failing to have conducted the discovery earlier."); Radich v. Goode, 855 F.2d

1391, 1393-94 (3rd Cir. 1989) ("requires that a party indicate to the district court its need for discovery, what material facts it hopes to uncover and why it has not previously discovered the information."); National Acceptance Co. Of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1318 (E.D. Wis. 1993) ("obligated to demonstrate affirmatively why it 'cannot respond to movant's affidavits . . . and how postponement of a ruling on the motion will enable [it], by discovery or other means, to rebut the movant's showing f the absence of a genuine issue of fact.'") (citation omitted).

330. Keebler Co. v. Murray Bakery Prod., 866 F.2d 1386, 1389 (Fed. Cir. 1989); see also Strang v. United States Arms Control & Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989) (plea too vague to require court to defer or deny summary judgment); Reflectone, Inc. v. Farrand Optical Co., Inc., 862 F.2d 841, 843 (11th Cir. 1989) ("'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts' . . . ."); Hickman, 152 F.R.D. at 221 (vague assertions insufficient).

331. Norris v. Davis, 826 F. Supp. 212, 216 (W.D. Ky. 1993).

332. 10 WRIGHT, supra note 11 § 2713, at 605; see also Pantry, Inc. v. Stop-N-Go Foods, Inc., 796 F. Supp. 1164, 1168 n.3 (S.D. Ind. 1992) ("no rule against multiple attempts at a favorable summary judgment on different legal theories based upon the same

allegation of fact."); Jackson v. Norris, 748 F. Supp. 570, 571 (M.D. Tenn. 1990) (different grounds).

333. Shouse v. Ljunggren, 792 F.2d 902, 904 (9th Cir. 1986).

334. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990).

335. 10 WRIGHT, supra note 11 § 2713, at 606-607.

336. Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., 10 F.3d 1563, 1565 n.2 (11th Cir. 1994); Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993); Wright v. South Ark. Regional Health Ctr., Inc., 800 F.2d 199, 202 (8th Cir. 1986). Section 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The genesis of 28 U.S.C. § 1291 may be found in the Judiciary Act of 1789 in which the First Congress established that "only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989)

337. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989) (citations omitted); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (citation omitted); see also Firstier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 273-74 (1991) ("For a ruling to be final, it must 'en[d] the

litigation on the merits' . . .and the judge must 'clearly declar[e] his intention in this respect.'") (citations omitted); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993); Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993); Madry v. Sorel, 440 F.2d 1329, 1330 (5th Cir. 1971) (not a final judgment because the order "contemplated further action on the merits."). As an illustration, an order granting summary judgment is a final order because the court has made a final determination on the merits of the case. Note, The Immediate Appealability Of Rule 11 Sanctions, 59 GEO. WASH. L. REV. 683, 687-88 (1991). In the criminal context, a final judgment does not occur until after conviction and imposition of sentence. Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

338. Gulfstream, 485 U.S. at 275.

339. Puerto Rico Aqueduct And Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

340. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The finality rule is strictly applied in the criminal context "because 'encouragement of delay is fatal to the vindication of the criminal law.'" United States v. MacDonald, 435 U.S. 850, 854 (1978) (citations omitted).

341. Richardson-Merrill Inc. v. Koller, 472 U.S. 424, 430 (1985).

342. Id.

343. Id. (citing United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)); see also Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993) ("Section 1291's finality requirement 'embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing proceeding by interlocutory appeals.'") (citation omitted).

344. See supra note 23.

345. Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 113 S.Ct. 1417 (1993); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987); see also Switzerland Cheese Ass'n., Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966) ("strictly a pretrial order that decides only one thing -- that the case should go to trial.").

346. Schmidt v. Farm Credit Serv., 977 F.2d 511, 513 n.3 (10th Cir. 1992); Lum v. City And County of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992) ("hold that there is no need to review denials of summary judgment after there has been a trial on the merits."); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) ("Denial of summary judgment is

not properly reviewable on appeal from a final judgment entered after a full trial on the merits."); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990) ("hold that where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed."); Holley v. Northrop Worldwide Aircraft Serv., Inc., 835 F.2d 1375, 1378 (11th Cir. 1988) ("a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which mitigate against his case."); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986) ("a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial."), cert. dismissed, 479 U.S. 1072 (1987).

347. Schmidt v. Farm Credit Serv., 977 F.2d 511, 513 n.3 (10th Cir. 1992); Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 113 S.Ct. 1417 (1993)..

348. See Morgan v. Harris Trust And Sav. Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989).

349. McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 253 (10th Cir. 1993); see also Stroehman Bakeries v. Local 776, 969 F.2d 1436, 1440 (3rd Cir. 1992); Peyton v. Reynolds Assoc., 955 F.2d 247, 253 (4th Cir. 1992); Abend v. MCA, Inc., 863 F.2d 1465, 1482 n.20 (9th Cir. 1988), affirmed, 495 U.S. 207 (1990); Barhold v.

Rodriguez, 863 F.2d 233, 237 (2d Cir. 1988); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968). Some appellate courts review both the grant and denial of a motion for summary judgment de novo, using the same standard as applied by the district court. Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994); Bender v. Brumley, 1 F.3d 271, 275 (5th Cir. 1993); Schmidt v. Farm Credit Serv., 977 F.2d 511, 514 (10th Cir. 1992). Other courts review summary judgment grants de novo, but review denials for an abuse of discretion. Leila Hosp. And Health Cent. v. Xonics Medical Sys., Inc., 948 F.2d 271, 275 (6th Cir. 1991); Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989); Pinney Dock And Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1472 (6th Cir.), cert. denied, 488 U.S. 880 (1988).

350. Stroehmann Bakeries, 969 F.2d 1440; Abend, 863 F.2d at 1482 n.20.

351. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 n.11 (9th Cir. 1990); American Motorists Ins. Co. v. United Furnace Co., 876 F.2d 293, 302 (2d Cir. 1989); Barhold, 863 F.2d at 237; cf. Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278-79 (5th Cir. Unit A Mar. 1981) (refused to review denial).

352. American Motorists Ins., 876 F.2d at 302; Barhold, 863 F.2d

at 237 ("for reasons of judicial economy, realizing that the issues presented by both motions are inextricably bound.").

353. Pacific Union Conf. Of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306 (1977); Lum v. City And County Of Honolulu, 963 F.2d 1167, 1169-70 (9th Cir. 1992) ("The appropriate forum to review the denial of a summary judgment motion is through interlocutory under 28 U.S.C. § 1292(b)."); Chappell & Co. v. Frankel, 367 F.2d 197, 200 (2d Cir. 1966) (recognizing the possibility).

354. 28 U.S.C. § 1292(b) (1993); see EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 1993).

355. 28 U.S.C. § 1292(b) (1993). The entire stated criteria must be met before review is appropriate. FRIEDENTHAL, supra note 11 § 13.3, at 593.

356. Philan Ins. v. Frank B. Hall & Co., 136 F.R.D. 80, 82 (S.D.N.Y. 1991). Appellate courts are very sensitive to the trial judge's determination on these questions and, if the trial judge has refused certification, the appellate courts will not use mandamus to force the trial judge to certify the issue for appeal. FRIEDENTHAL, supra note 11 § 13.3, at 593.

357. Burns v. County of Cambria, Pennsylvania, 788 F. Supp. 868, 869 (W.D. Pa. 1991); Philan, 136 F.R.D. at 82; see also

FRIEDENTHAL, supra note 11 § 13.3, at 592 n.16 ("granted cautiously and only in exceptional cases.").

358. Fluor Ocean Serv. v. Hampton, 502 F.2d 1169, 1170 (5th Cir. 1974); see also FRIEDENTHAL, supra note 11 § 13.3, at 592 n.15 ("Numerous opinions state that absent a trial judge's certification, there is no appellate jurisdiction.") (citations omitted).

359. Jeffrey W. Stempel, Renhquist, Recusal, And Reform, 53 BROOK. L. REV. 589, 634 (1987).

360. Robert J. Martineau, Defining Finality And Appealability By Court Rule: Right Problem, Wrong Solution, 54 U. PITT. L. REV. 718, 733 (1993). Courts of appeals frequently exercise their discretion not to hear appeals of certified cases. Id. at 734. As an illustration, between 1987 and 1988, the Sixth Circuit agreed to hear only 27% of certified appeals. Id. The Supreme Court has permitted appellate courts to refuse to hear certified cases "'for any reason, including docket congestion.'" Id. (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).

361. 367 F.2d 197 (2d Cir. 1966).

362. Id. at 200 n.4.

363. 748 F. Supp. 1257 (S.D. Ohio 1990).

364. SCI, 748 F. Supp. at 1265.

365. Id.

366. Communications Workers Of America v. American Telephone And Telegraph Co., 932 F.2d 199, 208 (3rd Cir. 1991); 32 AM. JUR. 2D Federal Practice And Procedure § 253, at 775-76 (1982). These writs include mandamus, prohibition, and quo warranto. Id. at 776; see also Pas v. Travelers Ins. Co., 7 F.3d 349, 353 (3rd Cir. 1993) ("Mandamus is authorized by the All Writs Act, 28 U.S.C. § 1651(a) . . . ."); In re NLO, Inc., 5 F.3d 154, 155 (6th Cir. 1993) ("This court may issue a writ of mandamus pursuant to the All Writs Act . . . .").

367. Communication Workers, 932 F.2d at 208. Technically mandamus is not an appeal; it is an original proceeding in an appellate court seeking an order directing the district court judge to enter or vacate a particular order. FRIEDENTHAL, supra note 11 § 13.3, at 594-95.

368. 28 U.S.C. § 1651(a) (1988).

369. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 34, 35 (1980); Kerr v. United States Dist. Court For The N. Dist. Of California, 426 U.S. 394, 402-403 (1975); In re School Asbestos Litig., 977 F.2d 764, 772 (3rd Cir. 1992); In re Life Ins. Co. of N. America, 857 F.2d 1190, 1192 (8th Cir. 1988); see also Star Editorial, Inc. v. United States Dist. Court For The Cent. Dist. Of California, 7 F.3d 856, 859 (9th Cir. 1993) ("used sparingly

because it entails interference with the district court's control of the litigation before it."). As a litigant, the trial judge may either hire counsel or permit counsel of a party to represent him, raising questions of potential bias in subsequent rulings in the case. Karen N. Moore, Appellate Review of Judicial Disqualification Decisions in the Federal Courts, 35 HASTINGS L. J. 829, 845 (1984). Further, forcing the judge into the role of a litigant reduces respect for the judiciary and the judicial system. Id.

370. Kerr, 426 U.S. at 403 ("issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed."); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3rd Cir. 1993) ("largely discretionary."); Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir. 1993); see also Moore, supra note 369, at 845 ("the decision to grant the writ is ultimately within the discretion of the appellate court."); 32 AM. JUR. 2D Federal Practice And Procedure § 258 (1982) ("awarded not as a matter of right but in the exercise of a sound judicial discretion and upon equitable principles.").

371. Doughty v. Underwriters At Lloyd's, London, 6 F.3d 856, 865 (1st Cir. 1993); see also Allied Chem. Corp., 449 U.S. at 36 ("our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, hardly ever!'") (emphasis in original); In re United States, 10 F.3d

931, 933 (2d Cir. 1993) ("an extraordinary remedy that this court does not grant lightly . . . .").

372. Mallard v. United States Dist. Court For The S. Dist. Of Iowa, 490 U.S. 296, 308 (1989); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 34, 35 (1980) (citations omitted); Kerr, 426 U.S. at 402 (citations omitted).

373. Doughty, 6 F.3d at 865; see also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) ("an extraordinary remedy, to be reserved for extraordinary situations."); Star Editorial, Inc. v. United States Dist. Court For The Cent. Dist. Of California, 7 F.3d 856, 859 (9th Cir. 1993) ("used sparingly"); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1059 (10th Cir. 1993) ("a drastic remedy, available only in extraordinary circumstances."); In re Life Ins. Co. Of N. America, 857 F.2d 1190, 1192 (8th Cir. 1988) ("invoked only in extraordinary situations."); Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987) ("an extraordinary remedy which should only be utilized in the clearest and most compelling of cases. . .

374. Moore, supra note 369, at 842; see also In re Steinhardt Partners, L.P., 9 F.3d 230, 234 (2d Cir. 1993) (even if the judge was "'very wrong . . . that is not enough.'") (citation omitted).

375. Mallard, 490 U.S. at 309; Allied Chem. Corp., 449 U.S. at 35; Kerr v. United States Dist. Court For The N. Dist. Of

California, 426 U.S. 394, 403 (1975); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993); Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir. 1993); In re Life Ins. Co. Of N. America, 857 F.2d 1190, 1193 (8th Cir. 1988); Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987) (plain duty to act, petitioner has a plain right to the performance, and no other adequate remedy to vindicate petitioner's rights). A writ of mandamus is not available when review by other means is "possible." Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1058 (10th Cir. 1993).

376. Mallard, 490 U.S. at 309.

377. Id.; Allied Chem. Corp., 449 U.S. at 35; Kerr, 426 U.S. at 402. The Ninth Circuit lists the following "guidelines" for determining entitlement to a writ of mandamus: "1) whether petitioner has no other adequate means, such as direct appeal, to obtain the requested relief; 2) whether petitioner will be damaged or prejudiced in any way not correctable on appeal; 3) whether the district court's order is clearly erroneous as a matter of law; 4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and 5) whether the district court's order raises new and important problems or issues of first impression." Weber v. United States Dist. Court For The Cent. Dist. Of California, 9 F.3d 76, 78 (9th Cir. 1993); Star Editorial v. United States

Dist. Court For The Cent. Dist. Of California, 7 F.3d 865, 869 (9th Cir. 1993). The Sixth Circuit has adopted this analysis. In re NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993); see also U.A.W. v. National Caucus Of Labor Comm., 525 F.2d 323, 325 (2d Cir. 1975) ("'usurpation of power, clear abuse of discretion and the presence of an issue of first impression.'") (citation omitted).

378. In re Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993) (citations omitted).

379. Communication Workers Of America v. American Telephone And Telegraph Co., 932 F.2d 199, 208 (3rd Cir. 1991). Merely establishing an "error of law," standing alone, does not satisfy this burden. In re NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993).

380. Communication Workers, 932 F.2d at 208.

381. In re School Asbestos Litig., 977 F.2d 764, 792 (3rd Cir. 1992); cf. Kershaw v. Shalala, 9 F.3d 11, 15 (5th Cir. 1993) ("When a district court for a legally erroneous reason refuses to act on a matter properly before it, mandamus is generally the appropriate remedy.").

382. In re School Asbestos Litig., 977 F.2d 764, 769 (3rd Cir. 1992).

383. Id. at 770.

384. Id.

385. Id. at 793.

386. Id. at 792 (emphasis added).

387. Moore, supra note 369, at 854.

388. Communications Workers Of America v. American Telephone And Telegraph Co., 932 F.2d 199, 210 (3rd Cir. 1991).

389. Chappell & Co. v. Frankel, 367 F.2d 197, 199-200 (2d Cir. 1966).

390. United States v. Victoria-21, 3 F.3d 571, 575 (2d Cir. 1993); In re School Asbestos litig., 977 F.2d 764, 772 (3rd Cir. 1992); 32 AM. JUR. 2D Federal Practice And Procedure § 259 (1982) (citations omitted).

391. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

392. In re School Asbestos Litigation, 977 F.2d 764, 793 (3rd Cir. 1992) ("the chief harm to the unsuccessful moving party is that it must bear the expense of going to trial.").

393. Communications Workers, 932 F.2d at 210; see also Moore, supra note 369, at 844-45 ("mandamus is not available simply because adherence to the final judgment rule would cause inconvenience, cost, or other hardship to the litigants."); 32 AM. JUR. 2D Federal Practice And Procedure § 258 (1982)

(unnecessary trials and hardships associated with delay do not justify mandamus).

394. 337 U.S. 541 (1949).

395. Id. at 543.

396. Id.

397. Id. at 544-45.

398. Id. at 545.

399. Id.

400. Id. at 546.

401. Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

402. 337 U.S. at 546-47.

403. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (citations omitted); see also Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988); Midland Asphalt Corp., 489 U.S. at 799; Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992); Manion v. Evans, 986 F.2d 1036, 1038 (6th Cir. 1993); EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 1993). Some courts also require petitioners meet a

fourth requirement: "the presentation of a serious and unsettled question of law." Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993).

404. Gulfstream, 485 U.S. at 276; Boughton v. Cotter Corp., 10 F.3d 746, 749 (10th Cir. 1993).

405. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376-77 (1981) (citing Abney v. United States, 431 U.S. 651 (1977); Stack v. Boyle, 342 U.S. 1 (1951)); see also Helstoski v. Meanor, 442 U.S. 500 (1979) (motions to dismiss under the Speech or Debate Clause).

406. Risjord, 449 U.S. at 377 (citation omitted).

407. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 499-500 [illegible] (citations omitted). The Court has also permitted claims of qualified immunity to be pursued by immediate appeal because such immunity is viewed as "'an immunity from suit.'" Id. (citation omitted); see also Puerto Rico Aqueduct And Sewer Auth. v. Metcalf & Eddy, Inc., 113 S.Ct. 684, 687 (1993) ("orders denying individual officials' claims of absolute and qualified immunity are among those that fall within the ambit of Cohen.")

408. Risjord, 449 U.S. at 376 (citation omitted).

409. Chasser, 490 U.S. at 498-99 (citation omitted); see also Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989).

410. Risjord, 449 U.S. at 377 (citation omitted).

411. Id.; see also Richardson-Merrill, Inc. v. Koller, 472 U.S. 424, 431 (1984) (the Court in Risjord "refused to permit an interlocutory appeal because it found an order denying disqualification to be reviewable on appeal after a final judgment.").

412. 367 F.2d 197 (2d Cir. 1966).

413. Id. at 198.

414. Id. at 199.

415. Id.

416. Id.

417. Id.

418. Id.

419. Martineau, supra note 360, at 742; see Puerto Rico Aqueduct And Sewer Auth. v. Metcalf & Eddy, Inc., 113 S.Ct. 684 (1993) (Eleventh Amendment immunity from suit).

420. Metcalf & Eddy, Inc., 113 S.Ct. at 687.

421. Id.

422. Id.

423. Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) (suffers injustice); Jarrett v. Epperly, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990) (unjust even if jury ultimately decides in the movant's favor); Locricchio v. Legal serv. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987) ("the party moving for summary judgment suffers an injustice if his motion is improperly denied.").

424. Martineau, supra note 360, at 767-68.

425. See Chappell & Co. v. Frankel, 367 F.2d 197, 200 n.4 (2d Cir. 1966).

426. Id. Since 1978, the Supreme Court has interpreted the collateral order doctrine narrowly. Id. at 740-41; Joseph G. Matye, Interlocutory Appeals Of Rule 35 Medical Examination Orders, 61 UMKC L. REV. 503, at 533 n.231 (1993) ("availability is limited due to the restrictions placed on its use by the Supreme Court.").

427. See supra notes 369-93 and accompanying text; see also Martineau, supra note 360, at 768 ("mandamus provides a weak exception to the final judgment rule because of the limitations placed on its use by the Supreme Court."); id. at 747 ("restrictive trend of the Supreme Court decisions").

428. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989).

429. 460 U.S. 1 (1983) (an order granting a stay of litigation in federal court is not an inherently tentative order).

430. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (citing Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 n.14 (1983)).

431. Moses H. Cone Memorial Hosp., 460 U.S. at 12 n.14 (emphasis added).

432. Cf. Mitchell v. Forsyth, 472 U.S. 511, 527 (1985). The denial of a motion for summary judgment based on the ground of qualified immunity is conclusive because it represents the court's conclusion that even if the facts are taken as true, the defendant is still not entitled to qualified immunity. Id. It is unlikely that the moving party will be able to alter the district court's conclusion by going to trial. Id.

433. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990); see also supra notes 332-35 and accompanying text.

434. Mitchell, 472 U.S. at 527; see Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982) ("While summary judgment often is inappropriate to dispose of cases involving issues of intent and motive, the moving party has the right to judgment without the expense of a trial when there are no issues of fact left for the trier of fact to determine.") (emphasis added).

435. The movant is not required to negate the nonmoving party's claim or defense. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

436. Mitchell, 472 U.S. at 527 (citing Abney v. United States, 431 U.S. 651, 659 (1977)).

437. See supra note 26.

438. Cf. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 n.14 (1983) ("as Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders 'inherently tentative' . . . ."") (citation omitted).

439. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

440. Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) ("a grant of summary judgment is a decision on the merits . . . ."); Southeast Bank v. Gold Coast Graphics Group, 149 F.R.D. 681, 683 (S.D. Fla. 1993) ("the granting of summary judgment is a disposition on the merits of the case . . . .").

441. 367 F.2d 197 (2d Cir. 1966). Specifically, the court stated: "the lower court's denial of appellant's motion for

summary judgment was directly concerned with the merits of appellant's substantive claim for relief and thus cannot be brought within the judicially created exception to the final decision rule, which permits appeal from 'collateral' orders . . . ." Id. at 199.

442. 385 U.S. 23 (1966).

443. 385 U.S. at 25; accord Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987). In Switzerland, the Court addressed the question whether the district court's order denying an injunction was interlocutory within the meaning of 28 U.S.C. § 1292(a)(1) because the motion for summary judgment served as a motion for an injunction. Switzerland, 385 U.S. at 24. Courts of appeal do have jurisdiction over interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions. 28 U.S.C. § 1292(a)(1) (1988).

444. 385 U.S. at 25.

445. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); In re Hastie, 2 F.3d 1042, 1044 (10th Cir. 1993).

446. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, (1986); Thrasher v. B & B Chemical Co., 2 F.3d 995, 996 (10th Cir. 1993).

447. Anderson, 477 U.S. at 249; Thrasher, 2 F.3d at 996.

448. Anderson, 477 U.S. at 255; see also Greenberg v. F.D.I.C., 835 F. Supp. 55, 56 (D. Mass. 1993) ("the Court reviews the facts in the light most favorable to the non-moving party.")

449. SINCLAIR, supra note 38 § 8.14, at 439-40 (emphasis in original).

450. Midland Asphalt Corp. v. United States, 489 U.S. 794, 800-801 (1989) ("deprivation of the right not to be tried satisfies the . . . requirement of being 'effectively unreviewable on appeal from a final judgment.'") (citation omitted)).

451. Van Cauwenberghe v. Baird, 486 U.S. 517, 524 (1988)

452. Baird, 486 U.S. at 523 (citing Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985)) (emphasis in original).

453. Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992) (citing Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); Janneh v. GAF Corp., 887 F.2d 432 (2d Cir. 1989), cert. denied, 111 S.Ct. 177 (1990))

454. Chaput, 964 F.2d at 1301.

455. Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989).

456. Id.

457. Id. (citing United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982)).

458. Id.

459. In a subsequent decision, the Court appeared to limit this requirement to "cases involving criminal prosecutions . . . . Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 499 (1989).

460. Manion v. Evans, 986 F.2d 1036, 1039 (6th Cir. 1993).

461. Chasser, 490 U.S. at 500.

462. Id.

463. 486 U.S. 517 (1988).

464. Id.; see also Manion v. Evans, 986 F.2d 1036, 1039 (6th Cir. 1993).

465. Chasser, 490 U.S. at 499; see also EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 1993) ("the cost associated with additional litigation does not justify setting aside the finality requirement of § 1291."). But cf. Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992) ("we may have jurisdiction on the ground that a release from liability protects the released party from the distractions and expenses of a trial as well as from further monetary liability.").

466. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (5th Cir. 1982) ("While summary judgment often is inappropriate to dispose of cases involving issues of intent and motive, the moving party has the right to judgment without the expense of a trial when there are no issues of fact left for the trier of fact to determine.") (emphasis added); SINCLAIR, supra note 38 § 8.14, at 436 ("In 1986 the Supreme Court established summary judgment standards that were "designed to balance the right of nonmoving party to receive a jury trial against the movant's right to be free from the burdens of needless litigation.") (emphasis added).

467. Umbenhauer v. Woog, 969 F.2d 25, 32 (3rd Cir. 1992).

468. Fairhead v. Deleuw, Cather & Co., 817 F.2d 153, 155 (D.C. Cir. 1993); Dean V. Veterans Admin. Regional Office, 151 F.R.D. 83, 84 (N.D. Ohio 1993).

469. Jeffrey D. Hanslick, Decisions Denying The Appointment Of Counsel And The Final judgment Rule In Civil Rights Litigation, 86 NW. U. L. REV. 782, 783 (1992). Two statutes, 28 U.S.C. § 1915(d) and 42 U.S.C.§ 2000e-5(f)(1), provide that a court may appoint a counsel for a party in a civil case. Id. (emphasis added).

470. Id.

471. Id. at 787. The Federal, Fifth, Eighth and Ninth Circuits permit appeals; while the First, Third, Fourth, Sixth, seventh,

Tenth, and Eleventh Circuits hold that decisions denying appointment of counsel do not satisfy the requirements of the collateral order doctrine. Id. at 787-88 (citations omitted).

472. Id. at 788 (citations omitted).

473. FED. R. CIV. P. 1.

474. Permitting interlocutory appeals of erroneous summary judgment denials would serve the important policy goals of providing appellate guidance on summary judgment law, censuring unacceptable behavior of trial judges who elect to ignore Rule 56's mandates, and protecting the interests of individual litigants by insuring that they are treated fairly and do not erroneously suffer the unnecessary pressures, costs and delay caused by an improper summary judgment denial. See Matye, supra note 426, at 519.

475. Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 24-25 (1966); EEOC v. Sears, Roebuck & Co., 839 F.2d 303, 353 n.55 (7th Cir. 1988); Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971).

476. Boughten v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993).

477. United States v. United States Gypsum Co., 340 U.S. 76 (1950) (district court may enter summary judgment on remand from

Supreme Court when the Court's opinion showed that a party was entitled to judgment as a matter of law).

478. Matye, supra note 426, at 530.

479. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C.A. § 2072 (c) (West 1993)).

480. Id. at § 315.

481. Pub. L. No. 102-572, 106 Stat. 4506 (1992).

482. Id. at § 101 (codified at 28 U.S.C.A. § 1292(e) (West 1993)); see Martineau, supra note 360, at 718; Matye, supra note 426, at 530.

483. Congress established the Federal Courts Study Committee in 1988 to examine the problems facing the court system, develop a long-range plan for its future, and make recommendations in applicable laws for the improvement of federal courts. Matye, supra note 426, at 529-30. The Committee recommended that Congress "consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals." Report of the Federal Courts

Study Committee 95 (April 2, 1990) (cited in Matye, supra note 426, at 530).

484. Matye, supra note 426, at 530-31 (citing H.R. Rep. No. 1006, 102d Cong., 2d Sess. 12-14 (1992), reprinted in 1992 U.S.C.C.A.N. 3921, 3921-23 (accompanying the 1992 legislation); H.R. Rep. No. 734, 101st Cong., 2d Sess. 15-17 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6861-62 (accompanying the 1990 legislation)).

485. David D. Siegel, Commentary On 1988 And 1992 Amendments, in 28 U.S.C.A. § 1292, 334, 335 (West 1993). The Committee recommended that the Court "'add to -- but not subtract from -- the list of categories of interlocutory appeal permitted by Congress' in Section 1292." Matye, supra note 426, at 531 (citation omitted).

486. Matye, supra note 426, at 531. The House Report specifically described the legislation "as designed 'to expand the appealability of interlocutory determinations by the courts of appeals.'" Siegel, supra note 485, at 335 (citing House Report 102-1006, Part 1, at 18 (Oct. 3, 1992)).

487. Siegel, supra note 485, at 335; see also Martineau, supra note 360, at 772 ("By its terms the amendment expands rather than contracts appealability because it permits additions but not deletions from section 1292."). Non-tort claims against the

United States (Tucker Act claims) for more than $10,000 are within the exclusive jurisdiction of the Claims Court. 28 U.S.C. § 1491 (1988). A party may bring a claim for less than $10,000 to either the Claims Court or the district courts. 28 U.S.C. § 1346 (1988). If the government believed that the amount of the claim exceeded $10,000, it could file a motion to transfer and cure the jurisdictional defect. Previously, a district court's order denying such a motion was an interlocutory order and not appealable. If after the final judgment, the appellate court reversed the order, the final judgment was also reversed, causing a huge and unnecessary waste of effort and money for both parties. Congress recognized this problem and in the 1988 Amendments to 28 U.S.C. § 1292 added paragraph (4) to § 1292(d), which expressly permits interlocutory appeals of denied motions to transfer. Seigel, supra note 485, at 334-35. Arguably, Congress views the waste of time and resources associated with unnecessary litigation -- the primary consequence of an improperly denied motion for summary judgment -- as a meritorious reason to permit interlocutory appeal of traditionally unappealable nonfinal orders.

488. Matye, supra note 485, at 532.

489. The Federal Courts Study Committee reported that in the last three decades, the number of appeals has multiplied fifteen-

fold, while the number of appellate judges has only trebled. Martineau, supra note 360, at 719 n.9 (citation omitted).

490. Matre, supra note 426, at 532; Thomas D. Rowe, Defining Finality And Appealability By Court Rule: A Comment On Martineau's "Right Problem, Wrong Solution", 54 U. PITT. L. REV. 795, 798 (1993). Contra Martineau, supra note 360, at 772 n.333 (nothing in Committee's report or the legislative history suggests that the court has this power). An option permitting review as a matter of right would cause undue burdens on courts of appeals. Matre, supra note 426, at 533.

491. Matye, supra note 426, at 532.

492. Id. at 533.

493. Fairhead v. Deleuw, Cather & Co., 817 F.2d 153, 155 (D.C. Cir. 1993); Dean v. Veterans Admin. Regional Office, 151 F.R.D. 83, 84 (N.D. Ohio 1993).

494. Umbenhauer v. Woog, 969 F.2d 25, 32 (3rd Cir. 1992).